UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

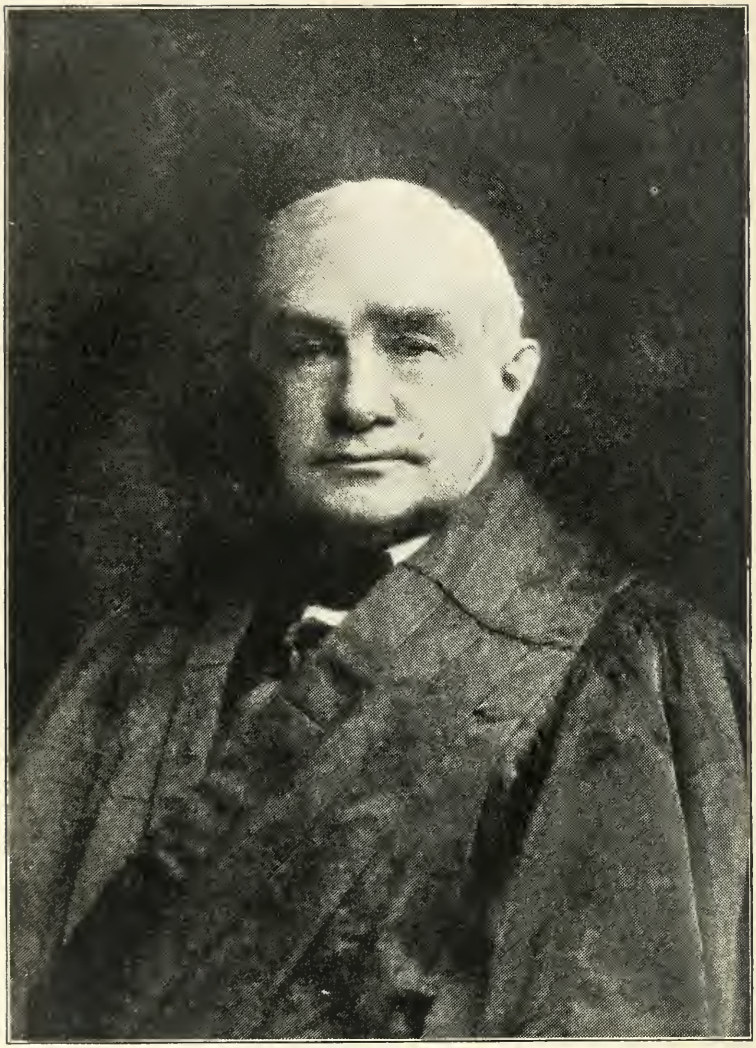
This book is DUE on the last date stamped below

FEB 21 1929

Form L-9–15*m*-8,'26

Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

http://www.archive.org/details/chadmanscycloped07chad



H. B. BROWN

CYCLOPEDIA OF LAW

Wills or the Law of Succession After Death

INCLUDING

THE ORIGIN AND HISTORY OF WILLS, THE STATUTE OF WILLS, THE INTERPRETATION OF WILLS, STATUTORY ENACTMENTS GOVERNING WILLS, WITH FORMS AND A SUMMARY OF THE STATUTES OF DESCENT AND DISTRIBUTION AND THE LAW OF ADMINISTRATION

VOL. VII

EDITOR IN CHIEF

HON. CHARLES E. CHADMAN, LL.B., LL.M., LL.D.

Assisted By

A CORPS OF LEGAL EXPERTS

PUBLISHERS

AMERICAN SCHOOL OF LAW

CHICAGO, U. S. A.

36345

T
C344c
1906

COPYRIGHT, 1906
BY FREDERICK J. DRAKE & CO.
CHICAGO

C1C8

KF
C34
V.7
c.1

AUTHORITIES CONSULTED.

E. S. ABBOTT,
Municipal Corporations.

W. A. ALDERSON,
Judicial Writs and Processes.

W. C. ANDERSON,
Law Dictionary.

W. F. BAILEY,
Personal Injuries.

F. H. BACON,
Life Insurance.

J. B. BISHOP,
Statutory Crimes.

G. T. BISPHAM,
Principles of Equity.

M. M. BIGELOW,
Life and Accident Insurance.

E. C. BENEDICT,
American Admiralty.

C. F. BEACH,
Modern Equity Practice.

E. E. BALLARD,
Real Property Law.

S. E. BALDWIN,
American Railroad Law.

W. E. BENJAMIN,
Bills, Notes and Checks.

W. BLICKENSDERFER,
Students' Review.

J. H. BREWSTER,
Conveyancing.

W. BLACKSTONE,
Commentaries.

G. BLISS,
Life Insurance.

H. C. BLACK,
Constitutional Problems.

C. L. BATES,
Federal Equity Procedure.

W. H. BROWNE,
Law of Trade Marks.

H. F. BUSWELL,
Personal Injuries.

F. M. BURDICK,
Partnership.

A. M. BURRILL,
Assignments.

J. BOUVIER,
Law Dictionary.

I. BROWNE,
Domestic Relations.

S. V. CLEVENGER,
Spinal Concussion.

G. A. CLEMENT,
Fire Insurance.

J. C. CHITTY,
Contracts.

C. D. DRAKE.
Attachment Suits.

G. B. DAVIS,
Military Law.

M. E. DUNLAP,
Elementary Law.

E. S. DRONE,
Copyright Law.

R. T. DEVLIN,
Law of Deeds.

C. B. ELLIOTT,
Public Corporations.

F. GIAQUE,
Notary's Manual.

S. GREENLEAF,
Evidence.

W. E. HAGAN,
Disputed Handwriting.

A. M. HAMILTON,
Medical Jurisprudence.

G. E. HARRIS,
Damages by Corporations.

J. G. HAWLEY,
International Extradition.

E. W. HUFFCUT,
Negotiable Instruments.

J. L. HIGH,
Injunctions.

F. N. JUDSON,
Interstate Commerce.

J. A. JOYCE,
Damages.

J. D. LAWSON,
Contracts.

J. R. LONG,
Domestic Relations.

S. S. MERRILL,
Mandamus.

J. W. MAY,
Law of Crimes.

G. L. PHILLIPS,
Code Pleading.

R. R. PERRY,
Common Law Pleading.

J. H. PURDY,
Private Corporations.

H. E. PAINE,
Law of Elections.

F. POLLOCK,
Contracts.

J. N. POMEROY,
Municipal Law.

J. RAM,
Legal Judgments.

J. J. REESE,
Toxicology.

W. C. ROBINSON,
Elementary Law.

W. H. RAWLE,
Covenants for Title.

W. C. RODGERS,
Domestic Relations.

H. D. SEDGWICK,
Law of Damages.

J. SCHOULER.
Personal Property.

C. H. SCRIBNER,
Dower.

G. SHARSWOOD,
Law of Lectures.

W. L. SNYDER,
Mines and Mining.

G. H. SMITH,
Elements of the Law.

A. A. STEARNS,
Suretyship.

J. F. STEPHENS,
Digest of Evidence.

H. TAYLOR,
International Law.

C. G. TIEDEMAN,
Real Property.

B. M. THOMPSON,
Equity Pleading.

H. C. UNDERHILL,
Criminal Evidence.

G. W. WARVELLE,
Abstracts of Title.

W. P. WILLEY,
Procedure in Pleadings.

F. WHARTON,
Law of Negligence.

W. WINTHROP,
Military Law.

T. A. WALKER,
American Law.

J. H. WIGMORE,
Examinations in Law.

J. G. WOERNER,
American Guardianship.

PREFACE.

Almost two years have elapsed since the publication of the sixth number of The Cyclopedia of Law, and, as originally planned, the entire Series of twelve books should now be completed. The many urgent inquiries from students and others as to the date of issue of this and the subsequent numbers of the Series has impressed me, as nothing else could, that these little books are fulfilling their mission of usefulness, and has urged me to use every available moment in their compilation.

While it will be impossible to prepare the subsequent numbers as rapidly as contemplated, it is expected that one or more numbers will be issued each year, and that within a reasonable time the Series will be completed. As it may be impracticable for present students of law to await the future issues, any student who has followed the course outlined by these books up to the present, will be able with a little aid to go forward with his studies in mastering the subjects not yet treated, and such aid as we can give in this line will be cordially extended to all students who will write us that they desire it.

This number—seven—of The Cyclopedia of Law Series, undertakes to present in simplified form, the principles of the law of Wills and the Settlement of Estates.

No demonstration is necessary to show the importance and generality of these subjects, and a very little inquiry will suffice to prove the common misunderstanding as to the law governing them. A perusal of this little book will, we believe, dispel most, if not all, of these errors, and a careful study of it, together with the statutes in the local jurisdiction, will give the student or citizen the same information and knowledge usually possessed by the ordinary practitioner of law; and alike sufficient for passing bar examinations and answering the purposes of every day business life.

Almost every man and woman, in this age, has some property to dispose of at death, and if the disposition is to stand it must be couched in legal and intelligible form. It is the design of the Author herein to give this information in simple and practical form, and at the least possible expense.

CHARLES E. CHADMAN.

Conneaut, Ohio, October 1st, 1903.

ABBREVIATIONS.

(See also the abbreviations given in previous numbers.)

Ad. & El.—Adolphus & Ellis' Reports, English King's Bench.
Am. and Eng. Encyc. of Law.—American and English Encyclopedia of Law.
Am. American.
Amb.—Ambler's Reports, English Court of Chancery.
Am. St. Rep.—American State Reports.
B. & Ald.—Barnwall & Alderson's Reports, English King's Bench.
Binn.—Binney's Reports, Pennsylvania Supreme Court.
Brown Ch.—Brown's Chancery Cases, English Chancery.
Cent. Dict.—Century Dictionary.
Ch. Div.—Chancery Division, English Law Reports.
Cin. L. Bull.—Cincinnati Law Bulletin, Cincinnati, Ohio.
Co. Litt.—Coke on Littleton.
Curt.—Curtis' Reports.
Deane Ecc. R.—Deane & Swabey's Reports, English Probate and Divorce.
Dec.—Decisions.
De Gex, M. & G.—De Gex, McNaughten & Gordon's Reports, English Chancery.
Del. Ch.—Delaware Chancery.
Duv.—Duvall's Reports, Kentucky Court of Appeals.
Dyer.—Dyer's Reports, English King's Bench.
Est.—Estate.
E. C. L.—English Common Law Reports.
Fla.—Florida Reports, Supreme Court.
Grat. or Gratt.—Grattan's Reports, Virginia Court of Appeals.
Green Ch.—Green's Chancery Reports, New Jersey Chancery.
Hare.—Hare's Reports, English Chancery.
H. L. Cas.—House of Lords Cases.
How.—Howard's Reports, United States Supreme Court Reports.
Hun.—Hun's Reports, New York Supreme Court.
Ia.—Iowa State Reports, Supreme Court.
Ir. or Ired.—Iredell's Reports, North Carolina Supreme Court.
Johns. Ch.—Johnson's Chancery Reports, English Chancery.
Johns. (Md.) Ch.—Johnson's Reports, Maryland Chancery.

Ks. or Kan.—Kansas Reports.
L. J. P.—Law Journal, English Probate.
L. R. A.—Lawyers' Reports Annotated, American Leading Cases.
L. R. P. D.—Law Reports, English Probate and Divorce Cases.
L. R. P. & M.—Law Reports, English Probate and Matrimony Causes.
L. R. Ch. Div.—Law Reports, Chancery Division, English Supreme Court of Judicature.
M. & G.—Manning & Granger's Reports, English Common Pleas.
Myr. Prob.—Myrick's California Probate Reports.
N. E. Rep.—North Eastern Reporter.
O. S. or O. St.—Ohio State Reports, Supreme Court.
O. C. C. or Ohio C. C.—Ohio Circuit Court Reports.
O. N. P. or Ohio N. P.—Ohio Nisi Prius Reports, Common Pleas.
Or. or Oreg.—Oregon Reports, Supreme Court.
Pac. Rep.—Pacific Reporter.
P. (with date).—Probate Division, English Law Reports.
R. or Rep.—Coke's English Bench Reports.
Rev. Stat.—Revised Statutes.
Rich Eq.—Richardson's Equity Reports, South Carolina.
S. C. or S. Car.—South Carolina Supreme Court Reports.
S. E. Rep.—South Eastern Reporter.
S. & T. or Sw. & Tr.—Swabey & Tristram's Reports, English Probate and Divorce Cases.
Tex.—Texas Reports, Supreme Court.
U. S.—United States Supreme Court Reports.
V. or Vs.—Versus, against.
Ves.—Vesey's Reports, English Chancery.
Vict.—Victoria.
W. & S.—Watts & Sargeant's Reports, Pennsylvania Supreme Court.
Zabr.—Zabriskie's Reports, New Jersey Supreme Court and Court of Errors and Appeals.

CONTENTS.

Page.
Preface iii
Abbreviations v

PART I.

CHAPTER I.

DEFINITIONS AND DIVISIONS.

Meaning of the Subject of Wills 1
General Division of the Subject 2
Law of Wills—Divisions 3
Definitions 3
Same Subject—Written and Unwritten Wills 6
Same Subject—Codicil Defined 7
Same Subject—A Will Distinguished from a Gift 7
Authorities on the Law of Wills 8

CHAPTER II.

ORIGIN AND HISTORY OF WILLS.

The Origin of Wills Coincident with the Rise of Private Property 11
The Status of the Will in England Prior to 1066 12
The Status of the Will After 1066 A. D. 12
The Attempt of the Courts of Equitay to Revive the Right to Will Lands 13
The Statute of Wills 14
History of Wills and Testaments in the United States.... 16

CHAPTER III.

WHAT PROPERTY MAY BE DISPOSED OF BY WILL.

Extent of Testamentary Power—General Rule..... 17
Same Subject—Exceptions to the General Rule..... 18
The Testator's Right to Make a Will Is Not a Property Right 22
The Rights of Devisees Under a Valid Will Become Vested Property Rights at the Death of the Testator... 24

CHAPTER IV.

WHO MAY MAKE A WILL.

The Present General Rule 27
Treating Disabilities Affecting Certain Persons..... 28
Same Subject—Modern Rule As to the Right of Married Women to Dispose of Property by Will 31
Disabilities As Regards Age 32
Same Subject—Effect of Statutory Requirements As to Age 34
Disabilities of Mind or Incapacity From Unsound Mind. 34
Same Subject—General Rule of Testamentary Capacity.... 36
Same Subject—Kinds of Mental Incapacity, General Statement 38
Same Subject—Kinds of Mental Incapacity, Idiots and Imbeciles 40
Same Subject—Kinds of Mental Incapacity, Lunatics.... 41
Same Subject—Special Forms of Temporary Insanity..... 44
Same Subject—Monomania and Insane Delusions..... 47
Disabilities by Reason of Mistake, Fraud, and Undue Influence 48
Undue Influence 52
Same Subject—Presumptions 54
Same Subject—Burden of Proof 55
Same Subject—Evidence 56
Same Subject—Effect of Undue Influence 58

CHAPTER V.

WHO MAY TAKE BY WILL.

The General Rule 59
Exceptions to the General Rule 59
Same Subject—Corporations 60
Same Subject—Subscribing Witnesses 61
Same Subject—Illegitimate Children 62

CHAPTER VI.

FORMALITIES REQUIRED IN MAKING WILLS.

General Discussion 63
A Will Must Be in Writing 63
Same Subject—Except Nuncupative Wills 64
What Is a Sufficient Writing? 66
Same Subject—The Form of the Written Instrument..... 68
Same Subject—Contingent Wills 71
Same Subject—Incorporation of Documents 73

Same Subject—What Is a Sufficient Reference? 74
Signing By the Testator 75
Same Subject—Who May Sign For Testator, and How.. 78
Same Subject—Where the Signature Should Be Upon the Will 78
Same Subject—Place of Signature As Required by the Statutes 79
Same Subject—Construction of "At the End Thereof".. 80
Sealing 82
Attestation and Subscription by Witnesses 82
Same Subject—What the Subscribing Witnesses Are Required to Attest 83
Same Subject—What Is a Sufficient Acknowledgment.... 84
Same Subject—Where, When and How the Witness Should Sign 86
Same Subject—What Is Meant by "In the Presence of Testator?" 88
Same Subject—The Attestation Clause Considered..... 91
Same Subject—Who Are Competent Subscribing Witnesses? 92
Same Subject—What Interest Will Disqualify a Person As a Witness?..... 93
Number of Persons Required to Attest a Will..... 95
The Publication of a Will..... 95
Formalities Required in Holographic Wills..... 96
Codicils Defined and Explained 98

CHAPTER VII.

FORMALITIES REQUIRED IN REVOKING WILLS.

Page.
What Is Meant by Revocation 101
General Requisites of Revocation 101
How Revocation Is Effected 102
Same Subject—By Direct Act of Testator 102
Same Subject—What Constitutes Revocation by Burning, Tearing, etc.....104
Same Subject—Revocation by Later Instrument.....111
Revocation Implied by Law 115
Same Subject—Effect of Birth of Child Upon Previous Will 120
Same Subject—Intentional Omission Explained.....121
Same Subject—What Constitutes a Provision For a Child.122

CHAPTER VIII.

REPUBLICATION, JOINT WILLS, CONTRACTS TO WILL, ETC.

The Republication of a Will 125
Joint, Duplicate and Mutual Wills Considered 126
Contracts to Leave Property by Will 128
By What Law a Will Is to Be Governed 131

CHAPTER IX.

PROBATE AND CONTEST OF WILLS.

What Is Meant by Probate? 133
The Method Followed in Probating Wills 134
The Courts Having Probate Jurisdiction 135
Nature of Probate Proceedings 136
What Instruments Should Be Probated, and When? 137
Who May Offer a Will for Probate? 138
The Formalities Necessary in Contesting a Will 141
Mode of Procedure at Trial of Contest 144
Probate and Contest of Lost and Spoliated Wills 149
The Probate of Foreign Wills 151
The Probate of Contingent Wills 152
After Probate the Will Is Carried Into Effect by the Executor 152

CHAPTER X.

CONSTRUCTION AND EFFECT OF WILLS.

What Is Meant by Construction and Effect? 155
Rules of Construction 156
Same Subject—(A) Of General Principles 157
(B) Special Rules of Construction.
Provisions Concerning Land 162
Provisions Concerning Personal Property 165
Provisions Concerning Relationship, or the Description of Beneficiaries 166
Gifts to a Class Considered 172
Residuary Clauses 175
The Kinds of Estates That May Be Given by Will 177
When Devises and Legacies Will Vest 187
Classes of Devises and Legacies 189
What Devises and Bequests Are Valid? 198
Provisions Concerning a Suit to Construe a Will 203
When Parole Evidence Will Be Admitted to Aid in Construction 204

PART II.

CHAPTER I.

THE LAW OF DESCENT AND DISTRIBUTION.

Descent and Distribution Part of the Law of Succession After Death 207
Meaning of the Words, "Descent and Distribution"..... 207
Nature of the Right to Take Property by Statutes of Descent and Distribution 208
What Law Governs Descent and Distribution 208
The Provisions of the Statutes of Descent 210
Provisions of the Statutes of Distribution 215

CHAPTER II.

ADMINISTRATION.

Scope of This Chapter 219
Who May Claim Appointment As Administrator?..... 222
Qualification for the Office of Administrator..... 224
How the Appointment Is Evidenced 225
What May Be Done by the Officer Before the Letters Are Issued 227
The Rights, Duties and Liabilities of Executors and Administrators 228
Same Subject—Personal Property As Assets 231
Same Subject—The Inventory and Appraisers 235
Same Subject—Concerning the Collection and Possession of Assets 236
Same Subject—Concerning the Management of the Estate 238
Concerning the Libaility of the Officer 245
Concerning the Payment of Debts and Legacies 247
Co-Executors and Co-Administrators 252
Foreign Representatives 253
Administrator With the Will Annexed 254
Administrator De Bonis Non 255
The Accounting and Discharge of the Administrator.... 255
The Questions for Students 259
Forms 275

WILLS;

—OR—

The Law of Succession After Death.

CHAPTER I.

DEFINITIONS AND DIVISIONS.

Sec. 921. *MEANING OF THE SUBJECT OF WILLS.—The subject of wills, or law of succession after death, is a topic which shows in its history and development the gradual rise of mankind from a condition of poverty and ignorance wherein man had neither personal or real property to the present state of affluence in all that pertains to supply the wants and luxuries of human existence. It also marks in its development the ascendency of the higher man-like traits of virtue and honesty and respect of law over the wild and brutish disposition of the savage, or man in the state of nature. With the acquisition of property came custom and then law governing its holding during the life, and distribution at the death of the owner.

What is more natural among reasoning beings than that the owner of property which he has acquired

*This book is No. 7 of The Cyclopedia of Law, the former 920 sections comprise the first six books of the Series.

should dispose of it as he wills at the time of his death? And yet we shall see that it was not always the rule or custom that a man might dispose of his property at or before his death as he saw fit. Long ages had to elapse before the right of an individual to dispose of his property had been firmly established, and many more years of development had to take place before the salutary systems of law came to be established which provide a fair and equitable distribution of the property of a deceased person when he has failed to make a will.

In all developed civilizations two systems regulating the disposition of a deceased person's property have come to prevail; the first, allowing the owner to name the person or persons who shall succeed to his estate, the second providing for a designation by law of those who shall succeed to the estate of a person who has made no will.

Sec 922. GENERAL DIVISIONS OF THE SUBJECT.—In all of the States of the Union there are laws substantially uniform providing for the disposition by *ante mortem* declaration of the property both real and personal of the owner. And in the absence of such a disposition by the owner, the State laws provide with great minuteness for the disposition of his property in accordance with the highest theory of justice and equity.

When the disposition is made by the owner it is termed a "Will," or taking by the will of the testator.

When the disposition is made by law it is known as a transmission of title by descent and distribution; and the statutes providing for such distribution in the absence of a will are usually designated statutes of "descent and distribution." One is the will which the party makes for himself; the other is the will which the law makes for him where he has failed to make one for himself. These two systems suggest the natural division of our subject into:

1. The law of wills. 2. The law of descent and distribution,—the whole subject falling within the general title of "The law of succession after death."

Sec. 923. LAW OF WILLS—DIVISIONS.—The law of wills may be appropriately treated under the following heads: 1. Definitions. 2. The origin and history of wills. 3. What property may be disposed of by wills. 4. Who may make a will. 5. Who may take by will. 6. The formalities required in making and revoking wills. 7. The construction and effect of wills.*

Sec. 924. DEFINITIONS.—A "Will," or "Last Will and Testament," is a solemn disposition of one's property in the form prescribed by law, and which, though made while living, does not take effect until the death of the maker.**

*The divisions of our subject are borrowed from those of Professor Floyd R. Mechem, under whom the author had the pleasure of receiving much valuable training, while a student in the Law Department of the University of Michigan.

**"A will is an instrument by which a person makes a

Blackstone's definition of a will, "the legal declaration of a man's intentions, which he wills to be performed after his death," is derived from that of the old Roman writers; and he says it is called a "will" in England because "its efficacy depends on its declaring the testator's intention." (2 Bl. Com. 500.)

The word "will" in its popular meaning, now includes the disposition of both real and personal property, though in its technical and historical sense, it designated an instrument disposing of realty only.*

---

disposition of his property, to take effect after his decease, and which, in its own nature, is ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature of the instrument." (McDaniel v. Johns, 45 Miss. 632; Jarman on Wills, I, 16.)

Will. "The formal instrument by which a person may make disposal of his property, to take effect at his death."—Abbott's L. Dict.

*"A will, or last will and testament, is a solemn act or instrument whereby a person declares his mind and intention as to the disposal of his lands, goods or effects, and what he would have done after his death."—Co. Litt. II, Ch. 10. "And the common law calls that a *will* where lands or tenements are given; and where it concerns goods and chattels alone, it is termed a testament."—Ibid.

"A will is a legal declaration of a person's intentions, to take effect after his death. The essential difference between a will and any other instrument or provision contingent upon death is that a will has no effect whatever until death, and may be freely revoked meanwhile; but a deed which may create or convey an estate in the event of death must take effect as binding the grantor in his lifetime. In English law the word *will* was originally used only of a disposition of *real* property to take effect after death; the word *testament* being

A person making a will is called the "testator" when a man; and the "testatrix" when a woman. One who dies leaving a will disposing of his property is said to die "testate," if without a will "intestate."

The granting words usually employed in a will are: —"give," "devise," and "bequeath;" of these the word "give" is the most comprehensive and may be used in reference to the transfer of any sort of property.

"Devise" is appropriately used when the gift is of real property, and "bequeath" when the will is of personal property. Likewise the word "devise," when used as a noun, signifies, when correctly used, a gift of realty, and "bequest" a gift of personalty.

"Legacy" is a word used to designate the gift of a sum of money. However, the technical, or real meaning of these words, is not so strict but that a gift will prevail, although the testator does not use them correctly. Thus a "bequest" may include both realty and personalty. (Evans v. Prince, 118 Ill., 593.) And a "devise" will prevail, although miscalled a "bequest." (In re White, 125, N. Y., 544.)

The word "testator" is the common designation of a person making either a will or testament; while "de-

---

then used, as in the Roman and civil law, of a disposition of personal property; hence the phrase, now redundant, *last will and testament.* In modern usage the term *will* does not necessarily imply an actual disposition of property; for, an instrument, executed with the formalities required by law, in which the testator merely appoints a guardian for his child, or merely nominates an executor, leaving the assets to be distributed by the executor among those who would take by law, is a will." (Cent. Dict., "Will.")

visor" is the correct name for one who makes a will, but the term is little used.

"Devisee" is the proper and legal word used to denote one to whom realty passes by will; while "legatee" is properly used in naming one to whom personalty passes by will. These words, however, are frequently interchanged in their usage.

Sec. 925. SAME SUBJECT—WRITTEN AND UNWRITTEN WILLS.—Wills are of two kinds. 1. Written. 2. Unwritten, or "nuncupative."

A written will, as the name suggests, is one in writing; when such a will is entirely written by the testator himself it is called a "holograph," spelled also "ograph." These holographic wills are made valid by statute in some of the States without the formalities of attestation required of other wills.*

Unwritten, or "nuncupative" wills are usually valid only where the testator was overtaken by sudden illness and had not time to make a written will. By statute in the various States, and in England, the power to make a nuncupative will is quite generally restricted to soldiers in service and sailors upon a voyage, who are only allowed to dispose of personal estate in this manner, and that usually only to the extent of a few hundred dollars. The reason being the great hazards attending the correct reporting of wills so made.**

*Jarman on Wills (5th Am. Ed), Vol. 3, 767 n.

**Prince v. Hazleton, 20 Johns, 502; Statute I, Vic. c. 26, Secs. 9-12; Cooley's Blackstone, II. 501 n; See Sec. 964, post.

Sec. 926. SAME SUBJECT—CODICIL DEFINED.—A "codicil" is a supplement, or addition to a will, made after the will and designed to alter or add to it. It may or may not be a separate instrument.*

Sec. 927. SAME SUBJECT—A WILL DISTINGUISHED FROM A GIFT.—A will differs from a gift in this respect; it is not intended to operate or take effect until the death of the testator, no title of any kind vests in those who take under it until that time, and it is subject to revocation at any time before the testator's death. A gift, on the other hand, must take effect in the present.

Gifts are of two kinds. 1. Gifts "*inter vivos.*" 2. Gifts "*causa mortis.*"

By a gift "inter vivos," that is, between the living, is meant a gift in the ordinary sense of the word; while gifts "causa mortis," are those made in contemplation of immediate death, and which become invalid if the person making the gift recovers. In either case, however, to make a gift valid a present title must vest in the donee.

To constitute a valid "donatio mortis causa," it is not only essential that delivery to the donee shall be complete during the donor's life, but the donee must also take and retain possession until after the donor's

*"Codicil, a supplement or addition to a will. It may change the dispositions of the will, or even revoke some of them, but does not revoke the entire will. The term codicil implies that the will, as modified by the codicil, stands."—Abbott's Law Dict.

death. Then in case the donor dies, the gift becomes complete, if he recovers, the title reverts to him.*

Sec. 928. AUTHORITIES ON THE LAW OF WILLS.—Among many books and treatises on the Law of Wills are the following: "A Treatise on Wills," by Thomas Jarman, an English writer, in three volumes, which has reached its 6th American edition. This is a very valuable and exhaustive work; Redfield's Law of Wills, is an American work in 3 vols., by Isaac F. Redfield, the well known author of the Law of Railways, which has reached its 4th edition. Other American authors are: Schouler, Underhill, Bigelow, Chaplin and Page. The books by Underhill and Professor Page are both recent works. There are also many valuable monologues on the various special topics in the subject of wills, for these the

*Appeal of Walsh, 122 Pa. St., 177; s. c. 9 Am. St. Rep., 83; Dunbar v. Dunbar, 6 Am. St. Rep., 166.

"*Donatio mortis causa.*"—"A gift in expectation of death, a gift of personal property made by a person in contemplation of his own death by delivery of the property to another to keep as his own in case of the donor's decease. The subject of such a gift can be personal property only; and, to constitute a valid *donatio mortis causa,* it must be made in actual peril of the death, and to take effect only in case of the death of the donor, and there must be an actual delivery of the property, or for the use of the donee, if such delivery can be made, according to the manner in which it is capable of being delivered. The gift is conditional, dependent upon the contingency of expected death, and is revocable during the life of the donor, therein differing from a gift *inter vivos.* It differs from a legacy in that it does not require any proceeding in the court of probate, or any assent or action on the part of the executor to perfect the title of the donee."—Abbott's Law Dict.

student is referred to the catalogues of the various law book publishers.

To those students of law who desire an up-to-date and general summary of the law and decisions in the various States of the Union on the law of wills, or succession after death, as well as the practice prevailing in the various jurisdictions in regard to the administration of estates, we recommend the "second edition of The American and English Encyclopædia of Law," published by the Edgar Thompson Company, of Northport, N. Y., and the volumes of the "Lawyers' Reports Annotated," embracing the most valuable decisions rendered in the highest courts of the various States and published by the Lawyers' Co-operative Publishing Co., of Rochester, N. Y.

CHAPTER II.

ORIGIN AND HISTORY OF WILLS.

Sec. 929. ORIGIN OF WILLS COINCIDENT WITH THE RISE OF PRIVATE PROPERTY.—Among very primitive peoples there was neither personal property nor realty in the hands of the individual, and consequently there could be no subject matter for wills. With the development of property rights in the individual came also the custom or privilege sanctioned by the public sentiment of the community, of allowing the owner to designate who shall succeed to his holdings. And also a general rule indicating who should take the property of a deceased person when he failed to dispose of it himself. These rules or customs were not always the same, and varied according to the theory of descent prevailing in the community where they had their origin.

In nearly all primitive nations property belonged to the community as a whole, and the right of the individual was to use, but not to segregate. Though later, and by degrees, the right of the individual to the lands surrounding his own habitation became recognized.*

Wills are thus of very ancient origin; their use and legal sanction having been well known to the Greeks and Romans. In England at the time of the Norman Conquest, wills of both real and personal property

*Page on Wills, 5.

were common. In the Roman law the will, though originally a public and irrevocable act, had come, prior to the time of Justinian's code, to have a striking similarity in its elements and effects to the modern will.

Sec. 930. THE STATUS OF THE WILL IN ENGLAND PRIOR TO 1066.—Prior to the Norman Conquest, A. D. 1066, the Anglo-Saxon law recognized the right of the owner to will both personal and real property. Although some authorities seem to think that this right was not general, but confined only to great personages, as the king, bishops, earldormen and the like.* It is quite possible that only such persons had property sufficient to warrant the trouble of making a will. There is some doubt also whether this pre-Norman will was revocable, or not, after being made.**

Sec. 931. THE STATUS OF THE WILL AFTER 1066 A. D.—The Conquest of England by the Normans in 1066, A. D., and the introduction of the feudal system, or the theory that all land belonged to the king and was leased or rented out by him to his head men upon their rendering military services,—naturally put an end to the disposition of land by will, as the two theories were incompatible.

The will, however, did not give place to the theory of the feudal system without a struggle, and though

*Pollock and Maitland's History of English Law, Vol. II, 318; Page on Wills, 7.

**Pollock and Maitland's History of English Law, Vol. II, 318-319.

the common law held that land could not be transferred by will, there were, in Kent, and some other boroughs and manors, exceptions to the general rule, and in these places lands could be devised. Personal property remained free to be disposed of by will, and an estate for years, being considered as personalty, could be disposed of by will.*

In 1285, the statute *de donis* (13 Ed. I, Stat. I.) was passed making the conditions in the deed or grant of the donor obligatory, and it was thought that where the word "devisee" was used in a deed of lands that such lands could thereafter be disposed of by will. But the courts held otherwise.**

Sec. 932. THE ATTEMPT OF THE COURTS OF EQUITY TO REVIVE THE RIGHT TO WILL LANDS.—In the fourteenth and fifteenth centuries the courts of equity in England undertook to modify the common law rule forbidding the disposition of lands by will. They did it in this way, the conveyancers had invented a plan by which the owner of land could deed it to a grantee to hold to the grantor's use, or to the use of any other person he might designate, and the equity courts would enforce the conditions of this grant; so when the grantor undertook to appoint to this use by will, the equity courts continued to uphold and enforce the use, thus practically making land, or its benefits, devisable.

*Black, Com. II, 375.

**Pollock and Maitland's History of English Law, Vol. II, 27.

In 1535, Parliament attempted to put an end to this roundabout method of devising land, through the doctrine of uses by passing what is known as the Statute of Uses. (27 Hen. VIII., Ch. 10.) The Statute of Uses provided in effect that the "seisin," or title, should follow the use and that the person taking the use should, in law, take the entire legal title. So when the grantor devised to his own use, he still held the legal title and when he devised to the use of a third person, such person was thereby put into possession of the full legal estate.

This statute would have put an end to the devising of lands in England, had not the equity courts, in their attempt to outwit Parliament and the common law, devised a new expedient. The method used was to interpose a second trust, that is, lands were deeded to A for the use of B in trust for C, and the equity courts simply upheld C's beneficiary interest, and allowed such an interest to be created by will.*

Sec. 933. THE STATUTE OF WILLS.—In 1540, just five years after the passage of the Statute of Uses, Parliament passed the Statute of Wills (32 Hen. VIII., Ch. 1), which was followed in 1542-43 by an act to interpret the Statute of Wills. (34-35 Hen. VIII., Ch. 5.) The purpose and effect of these two acts was to remove the restriction upon the devise of land at common law; under these statutes persons holding lands in fee simple, or in socage tenure, were en-

*Black. Com. II, 375-376.

abled to devise the same at their will and pleasure, except to bodies corporate; and those who held estates by the tenure of chivalry were enabled to devise two-thirds thereof.* The statute of 34-35, Hen. VIII., declared "that wills or testaments made of any manor, lands, tenements or other hereditaments, by any woman covert, or person within the age of twenty-one, idiot, or by any person *de non sane* memory, shall not be taken to be good or effectual in law."

From 1642 to 1659, under Cromwell, the feudal theories pertaining to the tenure of lands in England, were disregarded and after the Restoration of the monarchy, could not be revived, and nearly all lands thus came to be held by their possessors in fee-simple.

The feudal system did not affect the disposition of personal property by will, and all through the Norman period the right to make testamentary bequests prevailed. But in some parts of England, if not in the whole country, about the end of the twelfth century, the testator could only dispose of the whole of his personal property by testament, in case he left neither wife nor children, otherwise he could dispose of but a third of his personal property. One-third going to his wife, and known as the "wife's part," one-third to his children, and known as "child's part," or

*"The effect of these two acts was to enable all persons except feme coverts, infants, idiots and persons of non-sane mind and memory to devise by will and testament, in writing, two-thirds of their land held by Knight's services and all lands held by socage tenure. The beneficiary could not be a corporation by the terms of these statutes."—Page on Wills, 13.

"bairn's part;" in case he left only wife or children, he could dispose of one-half his property, the other half going to his wife or children.* This limitation upon the power of the testator came to be known as the "doctrine of reasonable parts."

This limitation on the power of the testator soon faded away, and by 1625, in the beginning of the reign of Charles I., it was the general rule throughout England that a testator could dispose of all his personal property, except in those districts where the old law still existed.** The Statute I, Vict. C. 26, passed in 1837, gave the testator the unlimited power of disposing of his personal property.

Sec. 934. HISTORY OF WILLS AND TESTAMENTS IN THE UNITED STATES.—In the United States each State has its own statute of wills, by which the question of capacity, form, execution and effect are determined. These statutes are based upon the English common law as modified by the Statute of Wills and subsequent statutes in England up to the time of the Declaration of Independence. In a few States settled by the French and Spanish, the law is colored by the French and Spanish Law.***

*Black. Com., II, 492.

**Black Com. II, 493.

***"The net result may be said to be, that in the greater part of the United States, the law of wills is of pure English origin, modified by modern statutes, showing some influence of Spanish and French law in some of the Southern and Western States; while in Louisiana the law of wills is of French-Roman origin, gradually yielding in some respect to the influence of the remaining common law States."—Page on Wills, Sec. 19.

CHAPTER III.

WHAT PROPERTY MAY BE DISPOSED OF BY WILL.

Sec. 935. EXTENT OF TESTAMENTARY POWER, GENERAL RULE.—We have seen in the previous chapter, that none of the restrictions incident to feudal times, and which prevailed under the English common law, became operative in the United States. And the general rule as to testamentary power in this country is, that all property, both real and personal, corporeal and incorporeal, vested and contingent, legal or equitable, which the owner may be entitled to at the time of his death, may be disposed of by his lawfully executed will.* And it is now the general rule that property acquired after the making of the testator's will, may pass by it, though as to real property the rule was formerly different.**

This general rule covers only such property as the testator owns, and his right to dispose of property by

*Page on Wills, Secs. 143-148; Harvard College v. Balch, 171 Ill., 275; Tompkin's Est., 154 N. Y., 634; Allen's Succession, 49 La. Ann., 1096; Dodge v. Gallatin, 130 N. Y., 117; Cressinger v. Welch, 15 Ohio, 156. "Any person of full age, and of sound mind and memory, and not under any restraint, having any property, personal or real, or any interest therein, may give and bequeath the same to any person by last will and testament lawfully executed."—Rev. Stat. of Ohio, Sec. 5914.

**Girard v. Philadelphia, 4 Rawle (Pa.), 323; Haley v. Gatewood, 74 Tex., 281; Pruden v. Pruden, 14 O. S., 251; Morgan v. McNeeley, 126 Ind., 537.

will is always subject to the payment of all his just debts, liens, incumbrances or other obligations created in his lifetime. And though his will dispose of all his property creditors can assert their claims and have them paid out of the devised property.*

Sec. 936. SAME SUBJECT—EXCEPTIONS TO THE GENERAL RULE.—To the general rule that all of the testator's property can be disposed of by will, certain exceptions, usually statutory, and substantially uniform throughout the United States are to be noted:

1. The expenses of administration and statutory allowances for the support of the widow and the minor children of the testator during the settlement of his estate, are usually made a charge upon the testator's property.**

2. The widow's dower is usually preserved to her, and takes priority over a devise of the realty, unless other provisions are made for her in the will which she elects to accept in lieu of her statutory right of dower, or unless it is waived by an ante-nuptial contract. Where the husband has similar interests in his wife's realty, he cannot be deprived of them by her will to which he does not consent.***

---

*Kimball v. Bible Soc., 65 N. H., 139; In re Kidd, 3 Ch. Div., 558; Young v. Snow, 167 Mass., 287.

**Rev. Stat of Ohio, Secs. 6038 to 6040.

***Cook v. Adams, 169 Mass., 186; Warren v. Warren, 148 Ill., 641; Spangler v. Dukes, 39 O. S., 642; Wilber v. Wilber, 52 Wis., 298.

In a few States she may have both the property bequeathed in the will and her dower. But the general rule is different; and in Ohio she may only have both, in case it plainly appears by the will to have been the intention of the testator that she should have both.*

3. The homestead interest of the widow and the children of the testator, given in some States, cannot be barred by the testator's will.**

4. In some States, certain interests in the husband's personal property are reserved by statute to the widow, and where this is done he cannot by will divest her of such property.***

5. In a few States, the property acquired by husband and wife is regarded as community property, or "acquets," which belong equally to the husband and wife, so that neither can dispose of the interest of the other by will.****

6. Posthumous children, or children born after the death of the testator, and not provided for in the will, usually take as though their parent had died intestate. And in some States, if the testator had no children at the time of executing his will, and a child is subse-

---

*Rev. Stat. of Ohio, Sec. 5963; Collier v. Collier, 3 Ohio St., 369.

**Peebles v. Bunting, 103 Ia., 489; Shorr v. Etling, 124 Mo., 42; Matheny's Est., 121 Cal., 267; Wells v. Church, 63 Vt., 116.

***Cummings v. Daniel, 9 Dana (Ky.), 361; Tyler v. Wheeler, 160 Mass., 206. So in Ohio, without express statute, Doyle v. Doyle, 50 O. S., 330.

****Mayo v. Tudor, 74 Tex., 471; Sharpe v. Loupe, 120 Cal., 89; Cox v. Von Ahlenfeldt, 50 La. Ann., 1266.

quently born, such will is deemed revoked, unless such child was provided for in the will, or so mentioned as to show the intention of the testator not to provide for it.*

7. Living children not provided for in the will of testator, are usually allowed to take as heirs, unless it appears from the will that their omission was intended. (Rhodes v. Weldy, 46 O. S., 234.)

8. In a number of States the statutes provide that a testator leaving a wife and children, cannot devise or bequeath his property to a charitable corporation or for charitable purposes, unless such will is executed a specified time before the death of the testator.** In Ohio this time is fixed at one year.*** But it is held that no one can take advantage of such defective will except those who would otherwise take the property which has been devised to the charitable purpose.****

9. In some States the statutes protect the wife and children of the testator from being barred by his will in favor of his mistress or illegitimate children. Thus in South Carolina, a testator leaving a wife and legitimate children, cannot devise more than one-fourth of

---

*Rev. Stat. of Ohio, Sec. 5959.

**Fairchild v. Edson, 154 N. Y., 199; Wetter v. Haversham, 60 Ga., 193; Luebbe's Est., 179 Pa. St., 447; Protestant Home v. Beecher, 87 Wis., 409; Schmidt's Est., 15 Mont., 117.

***Rev. Stat. of Ohio, 5915.

****Trustees Ohio St. Univ. v. Folsom, 56 O. S., 701.

the clear value of his property to such persons, and no device will be permitted to evade the provisions of such statutes.*

10. Another general statutory restraint upon the power of the testator to devise his property, is the statute or rule governing perpetuities. This rule of law is of long standing and is designated to prevent the postponement of the transfer of the legal title to real property beyond a reasonable time. The rule as generally fixed, both in England and the United States, provides that the vesting of the title of any estate cannot be postponed, upon a condition precedent, for a longer time than the life or lives of persons in existence at the creation of the estate, and twenty-one years thereafter.**

11. The interest which the testator may dispose of by will must be one which survives him and is not limited to his lifetime, as an estate for life.*** So, while a testator has the power of disposing of an insurance policy upon his life which is made payable to his estate or his executors, he cannot by will change the beneficiary, when one has been named and the rules of the company provide that the beneficiary must

*Breithautt v. Bauskett, 1 Rich. Eq. (S. Car.), 465; Gore v. Clark, 37 S. Car., 537; Beaty v. Richardson, 46 L. R. A., 517.

**Madison v. Larmon, 170 Ill., 65; Terrell v. Reeves, 103 Ala., 264; Rev. Stat. of Ohio, Sec. 4200.

***Young v. Snow, 167 Mass., 287; Studdard v. Wells, 120 Mo., 25.

be named in a particular way, as by an order acknowledged before a justice of the peace.*

In general, subject to the restrictions above named, a competent testator may dispose of his property as he pleases. He may select such of his children or relatives as he desires for his beneficiaries, or he may pass them all by and leave his property to strangers.**

Sec. 937. THE TESTATOR'S RIGHT TO MAKE A WILL IS NOT A PROPERTY RIGHT. —While the right to make a will is general, and may be exercised by all, under certain limitations, yet this right or privilege to dispose of one's property to take effect at death, is not, and has never been considered an absolute property right, so as to be protected by the various constitutional provisions designed to uphold and guard private property.*** As we have

*Mellows v. Mellows, 61 N. H., 137; Wilburn v. Wilburn, 83 Ind., 55; Pingrey v. Ins. Co., 144 Mass., 374; Masonic Assoc. v. Bunch, 109 Mo., 560; Arthur v. Odd Fellows Assoc., 29 O. S., 557; Hartwig v. Schiefer, 47 Ind., 64; Fox v. Senter, 83 Me., 295, Hanrihan v. Ingraham, 55 Hun, 257.

**It must be understood, however, that for a testator to disinherit his heirs at law, he must either expressly or by necessary implication, devise all of his property to others, and unless this is done the heirs at law will be entitled to the estate.

***Here is perhaps the easiest loop-hole for lessening the evils of private property, which centered in the hands of the few is becoming more threatening to the other absolute rights to life and liberty than any form of political despotism that ever maintained. It being granted that the right to make a will is a statutory rather than a natural and absolute right, it follows that the legislature in a state can curtail or limit the right or even take it away entirely. Why may not a people oppressed

seen in the previous chapters, the right to dispose of real estate by will did not exist at the early common law, and that the disposition of property by will has been a matter of gradual allowance, depending for the most part upon express statutory provisions, and at no time independent of legislative control.

The power to make a will is to be regarded, therefore, as a statutory right and not a natural or absolute right.* The legislature or sovereign authority in a State may not only prescribe regulations governing the making and construction of wills, but may also at any time qualify and limit the power to dispose of property by will. And this may be done after the real property sought to be disposed of by will has been acquired. (Patton v. Patton, 38 O. S., 590.) And the fact that the statutory changes in the law governing wills are made after the will has been executed by a living testator, and intended to apply

---

by the unholy acquisitions of the few use this lever to enact that a certain proportion, or even all, of the millions exploited from labor by the capitalist classes, at the death of the possessor should go to the state for the gradual purchase of the lands and mines and the machinery of production and distribution?

*Blackstone observes that the variety of laws and usages in regard to wills, and the further fact that there were countries where wills were not allowed, "serves to evince, that the right of making wills and disposing of property after death, is merely a creature of the civil state; which has permitted it in some countries and denied it in others; and even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven."—Bl. Com. II, 491.

thereto, does not make such changes infringe any constitutional provisions.*

In order that new laws governing wills may affect devises previously executed, the intention of the legislature must be plain, otherwise the law will be held to apply only to subsequently executed wills.**

Sec. 938. THE RIGHTS OF DEVISEES UNDER A VALID WILL BECOME VESTED PROPERTY RIGHTS AT THE DEATH OF THE TESTATOR.—It is to be understood that the rights of devisees and legatees under a valid will become vested property rights at the time of the testator's death and cannot thereafter be subject to legislative control. And any attempt by the legislature, through subsequent statutes, either to make a valid will invalid, or an invalid will valid, the testator having deceased before the passage of the statute, would be unconstitutional. That is, where a will is invalid under the law in force when the testator died, no subsequently passed statute can make it valid, and likewise, if the will is

*Blackburn v. Tucker, 72 Miss., 735. In this case it was held that a change in the law after a will had been executed, and while testator was yet living, making a devise of lands for a charitable purpose void, was valid, and nullified the devise.

**Swan v. Sayles, 165 Mass., 177. So in a case where the statute providing that witnesses should no longer be necessary to the execution of a will, this statute was held not to make valid a will that had been executed without witnesses previous to the passage of the statute.—Packer v. Packer, 179 Pa. St., 580.

valid, no subsequent legislative act can destroy its validity.*

But the death of the testator will not prevent the legislature from changing the laws governing the settlement of estates, though such laws include the estate of the deceased testator. Thus where the subsequent law gave the surviving executor power to sell lands mentioned in the will, it was held valid.**

*People v. Powers, 147 N. Y., 104; Hartson v. Elden, 50 N. J. Eq., 522; Jones v. Robinson, 17 O. S., 171; Remington v. Bank, 76 Md., 546.

**Bredenburg v. Barlin, 36 S. Car., 197. See also McGillis v. McGillis, 154 N. Y., 532.

CHAPTER IV.

WHO MAY MAKE A WILL.

Sec. 939. THE PRESENT GENERAL RULE.—As a general rule, any person of the required age, of sound mind, and under no constraint, may make a will of both real and personal property, by complying with the prescribed statutory formalities.

At the early common law, the requirements regarding capacity to make a will and testament were widely divergent, because of the essential difference in the two classes of property, and the fact that testaments were construed by ecclesiastical or canon law, while wills were governed by statute and common law. Under modern legislation the capacity required to make a devise of realty and a bequest of personalty, are the same, except in a few States, where some slight distinctions are made.

In discussing capacity to make a will, it is to be understood that the testator must be of the required capacity at the time of making the will. If he is not qualified at the time the will is executed, the fact that he subsequently becomes capacitated will not make the will valid, unless it is re-published, which is practically a re-making of it at the time he becomes qualified; and if he is qualified when the will is made, his

subsequent incapacity will not destroy the validity of the will.*

This general rule as to who may make a will, we will now discuss as regards: I. Disabilities of certain persons; II, disabilities as regards age; III, disabilities of mind, and IV, disabilities by reason of constraint, or undue influence.

Sec. 940. I. TREATING DISABILITIES AFFECTING CERTAIN PERSONS.—Under this section we shall discuss certain general disabilities which have prevailed affecting: (a) Criminals, (b) Aliens and (c) Married women.

(a) Criminals. Under the ancient law, many persons who were regarded as offenders against municipal or religious laws, were classed as outlaws, and under the doctrine of attainder, they were prevented from inheriting or disposing of property and consequently could not make a valid will. Our federal constitution abolishes attainder, or corruption of blood, so that the estate of a convicted felon is not forfeited, and unless the State statutes provide that a convict can not make a valid will, he may do so.**

(b) Aliens. At common law an alien might make a will of personal property, but as his real property was held subject to be defeated at any time by the rights of the State or sovereignty in which he lived,

*Reichenbach v. Rubach, 127 Pa. St., 564; Martin v. Thayer, 37 W. Va., 38; Osgood v. Breed, 12 Mass., 525; Etter v. Armstrong, 46 Ind., 97; Burkett v. Whittemore, 36 S. Car., 428.

**Kenyon v. Saunders, 18 R. I., 590.

his power to will such property was limited by this defeasible title.* But in many States of the Union, all restrictions upon the property rights of aliens have been abolished, where they have not been abolished, the common law rule still prevails.**

(c) Married Women. Unmarried women are subject to the same rule as other persons, but married women at common law, and to some extent under modern statutes, are subject to restrictions upon their testamentary powers.

Thus at common law, a married woman was, with the exception hereafter noted, entirely incompetent to make a will of real estate, even with her husband's consent, or though her husband was the devisee."'

As an exception to the above rule, a married woman could at common law, dispose of by will, real

*Black Com., 372; Taylor v. Benham, 5 How. (N. S.), 233; Gray v. Kauffman, 82 Tex., 65; Phillips v. Moore, 100 U. S., 208.

**In Iowa Aliens may hold 320 acres of land for a period of ten years. Frurenes v. Severtson, 102 Iowa, 322. The right of the states to limit or forbid non-resident aliens to acquire or hold real estate, is limited by the treaties made by the U. S. with other nations, by which the citizens of each country are allowed to hold real property within the territory of the other. Burrow v. Burrow, 98 Ia., 400; Adams v. Akerlaund, 168 Ill., 632; Rixner's Succession, 48 La. Ann., 552; 32 L. R. A., 177.

***Bacon's Abr. Wills, b. p. 481; Osgood v. Breed, 12 Mass., 525; Bradish v. Gibbs, 3 Johns, Ch. 523; Fitch v. Brainard, 2 Day, 163. By the original Statute of Wills, 22 Hen. VIII, married women were apparently allowed to make wills, but this apparent power was promptly changed by the Stat., 34 Hen. VIII, c. 5, which expressly excepted married women from those who might make a will.

estate to which she had an equitable title, as by virtue of the conveyance of it to trustees for her sole and separate use.* And she could also dispose of real estate, conveyed to her use, by appointing beneficiaries, where a power authorizing such appointment was contained in the conveyance.**

As to personal property at the common law, a married woman could only make a will disposing of her personal property, in case her husband gave his consent to the particular will in question, with a full knowledge of its contents, and did not revoke his consent before the will was probated.*** The consent of the husband might be by parol before or after the wife's death, and might be express or implied. It must have been to the very will in question with knowledge of its contents and could always be revoked by the husband before probate, but not afterwards.****

---

*Rich v. Cockell, 9 Ves. Jr., 369; Peacock v. Monk, 2. Ves., 190. Where by contract made before or after marriage, upon a new consideration, a woman reserved power to dispose of her separate property by will, equity would enforce the contract, without the appointment of trustees. Hall v. Waterhouse, 5 Giff., 64; Johnson v. Johnson (Ky.), 24 S. W., 628.

**Hawkins v. Kemp, 3 East, 410; Pride v. Bubb, 41 L. J. Ch., 105; Wagner v. Ellias, 7 Pa. St., 411; Dunn's Appeal, 85 Pa. St., 94.

***Marston v. Norton, 5 N. H., 205; Anderson v. Miller, 6 J. J. Marsh (Ky.), 569. The reason for this rule being that at common law, a wife really had no personal property unless by the consent of her husband; see in this connection No. 3, Home Law School Series, Secs. 319-322.

****Kurtz v. Saylor, 20 Pa. St., 205; Brook v. Turner, 2

As an exception to the above rule, a married woman might at common law make a testament without her husband's consent, disposing of personal property settled upon her to her sole and separate use, and this whether such property was derived from her husband or from a third person.*

Sec. 941. SAME SUBJECT—MODERN RULE AS TO RIGHT OF MARRIED WOMAN TO DISPOSE OF PROPERTY BY WILL.—In the United States, nearly all of the common law disabilities affecting married women in relation to their property have been removed by statutes. Thus in Arkansas, Connecticut, Delaware, Georgia, Indiana, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia and Wisconsin, married women have substantially the same rights to dispose of property by will as unmarried women and men. In Missouri, New Hampshire, New Jersey, Oregon, Rhode Island, Tennessee and Virginia, a married woman is unrestricted except as to her husband's right of courtesy. In California, Kansas and

---

Mod,. 170; Cutter v. Butler, 25 N. H., 343. A married woman could also dispose of her personal property by will where her husband was incapacitated to act for himself, or had abjured the realm, was a convicted felon, or civilly dead. See Page on Wills, Sec. 89.

*Tucker v. Inman, 4 M & G., 1049; Lee v. Bennett, 31 Miss., 119.

Massachusetts, married women may dispose of but half of their estate without the husband's consent.

In Alabama, Arizona, California, Georgia, Kentucky, Louisiana and Washington, they may dispose of their statutory separate property by will.* State statutes are continually modifying and liberalizing the restrictions imposed upon married women and it is possible that new statutes have been passed in some of the States above mentioned doing away with more of the common law restrictions on the wife's right to dispose of her property. (See Subject of Wills in 2d ed. Am. & Eng. Encyc. of Law.)

Sec. 942. II. DISABILITIES AS REGARDS AGE.—Nonage, or lack of capacity to make a will because of immature age, has been one of the disabilities common to all legal systems. Under the early English ecclesiastical law a will of personal property could be made by males at the age of fourteen, and by females at the age of twelve years and over. The

*Where state statutes require the husband's consent to the wife's will, or testament, this consent must usually be in writing. Gregory v. Oates, 92 Ky., 532; Tyler v. Wheeler, 160 Mass., 206. The right of a married woman to dispose of her property by will, thus depends upon statutes either giving her express power or removing the disabilities imposed by the common law; these statutes are so construed that only the form of will prescribed therein can be made by the married woman. Thus where the statute provided that she might make a will of her separate estate, when attested by witnesses, it was held that a holographic will without witnesses was invalid, though such a will would have been valid if made by a man or unmarried woman. Scott v. Harkness (Ida.), 59 Pac. Rep., 556.

Statute of Wills (32 Henry VIII.) fixed the age for capacity to will real property at twenty-one years.* The Statute of I. Vict. fixed the age of capacity at twenty-one years for both real and personal property.

In the majority of the United States a person must have reached the age of twenty-one years to have capacity to make a will as respects real or personal property.** In some of the States the age of capacity required is twenty-one years for real estate and eighteen years for personal property.*** In a few States, the statutory age for making a will is eighteen years for both real and personal property.**** In Colorado, Illinois, Maryland, Missouri, and Washington, the age of capacity is fixed at twenty-one years for males and eighteen years for females. In New York, a person must be twenty-one years of age to dispose of realty by will; and if a male person, eighteen years of age,

---

*II. Black Com., 497.

**This is the rule in Arizona, Florida, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, South Carolina, Texas, West Virginia and Wyoming.

***This is the rule in Alabama, Arkansas, Oregon, Rhode Island and Virginia.

****This is the rule in California, Connecticut, Idaho, Montana, Nevada, North Dakota, South Dakota and Utah. In Wisconsin 21 years is required in all cases, except that a married woman is competent to make a will at the age of 18 years. In Colorado persons at the age of 17 years can make a valid will of personal property.

and if a female, sixteen years of age, to dispose of personalty.

Sec. 943. SAME SUBJECT — EFFECT OF STATUTORY REQUIREMENTS AS TO AGE.— The State statutes fixing the age of capacity to make a will always control whenever this question arises. The statutes, therefore, should always be consulted in determining the age of capacity.

A person is deemed to have attained the age required on the last day of the year immediately preceding the prescribed year, that is, if the age of capacity is twenty-one, a person is of full age on the last day of his twentieth year.*

Sec. 944. III. DISABILITIES OF MIND OR INCAPACITY FROM UNSOUND MIND.—In order to make a valid will, the testator must at the time of making it, be of sound mind. No inflexible rule can be laid down for the determination, in every case, of what constitutes "sound mind."

The term "sound mind" involves two requisites; first, there must be mind, that is, intelligent capacity, and second, it must be sound, that is, free from insane delusions.

While there is not, and in the very nature of the case, cannot be, an arbitrary test to settle capacity, yet certain general rules or principles have come to prevail, which in a manner, fix the boundaries between capacity and incapacity in this respect. This rule,

*Bacon's Abr. Wills (B), 481; Ex parte, Holyland, 2 Ves. 11.

which is given in the next section, does not require perfect mental sanity, though at one time the English court seemed to lean towards that conclusion.* Both the English and the American courts now hold that a person may not be perfectly sane on all subjects and yet possess sufficient mental capacity to make a will.**

Mental capacity to make a will is not synonymous with criminal responsibility, and no test can reduce them to a common standard. A person may be mentally unsound to the degree of irresponsibility for criminal acts and yet have sufficient mental capacity to make a valid will. This is so because the mental attributes in each case may be entirely different, that is, a man may know how to dispose of his property and yet have an insane delusion which would lead him to commit a crime.***

And while it is sometimes said that testamentary capacity and contractual capacity, or capacity to make contracts, are the same, this is not strictly true.**** In some cases it is held that mental capacity to make

*Smith v. Tebbitt, L. R. Pro., 398; Waring v. Waring, 6 Moore, P. C., 341.

**Smee v. Smee, L. R. 5, P. D., 84; Banks v. Goodfellow, 39 L. J. Q. B., 237; Pidcock v. Potter, 68 Pa. St., 342; Wallis v. Luhring, 134 Ind., 463. So that it would be error for a court to charge that to have mental capacity to make a will, testator must have a mind wholly free from error.—Schreiner v. Schreiner, 178 Pa. St., 57; Page on Wills, Sec. 94.

***Page on Wills, Sec. 95; McTaggart v. Thompson, 14 Pa. St., 149.

****Coleman v. Robertson, 17 Ala., 84.

a will must be of a higher degree than capacity to make a contract.* Other cases hold that a lower degree of mental soundness will suffice to make a will than is required to make a valid contract.** This divergence of opinion, Professor Page thinks, suggests the true view, which he states to be, "that testamentary capacity and contractural capacity are so different in their nature that it is impossible to use one as a test for measuring the other, or to say that the existence of one either proves or disproves the other's existence conclusively."***

Sec. 945. SAME SUBJECT—GENERAL RULE OF TESTAMENTARY CAPACITY.—The general rule or test of mental capacity is as follows: If the testator is able, without prompting, to summon before his mind, on the same occasion, and hold there for a reasonable time the nature of the business about which he is engaged, the persons who might naturally be the objects of his bounty and his relations to them, the kind and extent of the property to be disposed of, and the scope and effect of the disposition which he is

*Boughton v. Knight, L. R. 3, P. L. D., 64; Chandler v. Bennett, 21 La. Ann., 58.

**Converse v. Converse, 21 Vt., 168; Thompson v. Kyner, 65 Pa. St., 368; Brinkman v. Rueggesick, 71 Mo., 553.

***Page on Wills, Sec. 96; Turner's Appeal, 72 Conn., 305; Brown v. Mitchell, 88 Tex., 550. It is to be observed that where the state statute defines testamentary capacity by declaring it to be the ability to make a valid deed or contract, such statute puts an end to judicial construction of testamentary capacity. Connelly v. Beal, 77 Md., 116.

about to make, he will be considered to have sufficient mental capacity to make a valid will.*

"Greater capacity than this the law does not demand; less than this is insufficient; and in each case it is a question of fact or of mixed law and fact whether the testator possesses the requisite capacity. While not necessary, it is perfectly proper to qualify such a rule by adding that an insane delusion directly affecting the will may destroy testamentary capacity."**

It is not necessary that the testator should know the number and the condition of his relatives, or that he should be able to give an intelligent reason for giving or withholding from any of them; nor that he should remember the names of absent relatives; nor that he should call to mind every item of his property, and its value; nor that he should know the precise

*"A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty. It is not necessary that he should collect these in one review. If he understands in detail what he is about and chooses with understanding and reason between one disposition and another, it is sufficient for making a will." Wilson v. Mitchell, 101 Pa. St., 495; Hoopes' Est., 174 Pa. St., 373; Rolles v. Kling, 150 Ind., 159; Cash v. Lust, 142 Mo., 630; Chaffey v. Ledwith, 56 N. J. Eq., 333; Entwistle v. Meikle, 180 Ill., 9; Peninsular Trust Co. v. Barker, 116 Mich., 333.

**Page on Wills, Sec. 97, citing Coleman v. Robertson, 17 Ala., 84; Burney v. Torrey, 100 Ala., 157; Tobin v. Jenkins, 29 Ark., 151, and other cases.

legal effect of the provisions which he makes in the will.*

Under this general rule it has been held that a man may be capable of making a will, and yet be incapable of making a contract or deed. The reason being, that it takes more mind, more capacity, to bargain with someone else than simply to give away property. It has also been held that less capacity will suffice for making a will than for the transaction of ordinary business, and that a person who has the capacity to transact ordinary business has sufficient capacity to make a will. (Farmer v. Farmer, 129 Mo., 530; Orchardson v. Cofield, 171 Ill., 14.)

Sec. 946. SAME SUBJECT—KINDS OF MENTAL INCAPACITY, GENERAL STATEMENT. —Mere physical weakness, deformity, or disorder, is not alone enough to incapacitate. A man may make a valid will though he is blind, or deaf, or dumb, or exceedingly weak and feeble in body, or of great age, or very near his death.** Though all of these facts are of importance, and to

*Couch v. Gentry, 113 Mo., 248; Yoe v. McCord, 74 Ill., 33; Burney v. Torrey, 100 Ala., 157; O'Brien v. Spalding, 102 Ga., 90; Smith v. Smith, 48 N. J. Eq., 566; Hall v. Perry, 87 Me., 569; Thompson v. Kyner, 65 Pa. St., 368; Delafield v. Parrish, 25 N. Y., 9; Reichenback v. Rudach, 127 Pa. St., 564.

**Goods of Beale, 3 S. & T., 430; Potts v. House, 6 Ga., 324; Wilson v. Mitchell, 101 Pa. St., 495; Ayres v. Ayres, 43 N. J. Eq., 565; Bain v. Cline, 24 Oreg., 173. The rule at common law was that persons born deaf and dumb, or blind, were considered "non compotes" and without capacity to make a will. 2 Bl. Com., 497; Yong v. Sant. 1 Dyer, 550.

be considered where the question of "undue influence" is involved.* But none of the above facts are sufficient to invalidate a will if the testator has sufficient mental capacity as stated in the general rule given in the previous section (Sec. 945), that is, if he understands the nature and extent of his property, his relation to, and the proper objects of his bounty, and the nature of the act which he is about to perform.**

So mere weakness of memory, vacillation of purpose, eccentricities of the person, as vanity, selfishness, credulity, filthiness, belief in witchcraft, or spiritualism, or mere miserliness, are not enough to invalidate the will of a person, these peculiarities and failings being common to all in a greater or less degree, and having of themselves no effect upon testamentary capacity.*** But it is to be remembered that if these eccentricities are the result of insanity, or the symptoms of insanity, the rule will be different.

The fact that the will is unjust and foolish is not necessarily evidence of unsound mind in its maker, though these facts raise a presumption against mental capacity.

It is capacity to make the particular will in ques-

---

*Page on Wills, Sec. 117; see also Sec. 951.

**Bevelot v. Lestrade, 153 Ill., 625; Hathorn v. King, 8 Mass., 371.

***Bennett v. Hibbert, 88 Ia., 154; Austen v. Graham, 8 Moore, P. C., 493; Farnum v. Boyd, 56 N. J. Eq., 766; Tallman's Will, 144 Pa. St., 286; Prentiss v. Bates, 88 Mich., 567.

tion that is required of the testator, and not capacity to make a will generally. So that if testamentary capacity, according to the general rule already given, exists at the time of making the will involved, it is sufficient. There are certain forms of mental unsoundness which quite generally are held to incapacitate a person from making a will, and though it is truly said that a complete discussion of these belong to the domain of psychology and medicine, we will discuss them briefly.

Sec. 947. SAME SUBJECT—KINDS OF MENTAL INCAPACITY, IDIOTS AND IMBECILES. —An idiot is a person who from birth has been deficient in intelligence, or, as stated by Blackstone, "who hath had no understanding from his nativity, and therefore is by law presumed never likely to attain any." (I. Bl. Com, 302.) Technically the term "idiot" includes only those who were born deficient, and thus differs from an "imbecile" who has become mentally deficient by reason of sickness, or disease.* Idiots have no testamentary capacity.**

But mere weakness of mind whether natural, or caused by sickness or age, will not incapacitate a person from making a will if he has that degree of soundness of mind which has already been described.***

*Speedling v. Worth County, 68 Ia., 152; Delafield v. Parish, 25 N. Y., 9.

**Hovey v. Chase, 52 Me., 304.

***Bennett v. Bennett, 50 N. J. Eq., 439; Hoban v. Campua, 52 Mich., 346.

Imbeciles, as regards their mental condition, are considered the same as idiots, and are without testamentary capacity.*

Sec. 948. SAME SUBJECT—KINDS OF MENTAL INCAPACITY, LUNATICS.—Under this topic of lunatics, or lunacy, we include all that class of persons whose minds once rational, have from accident, disease, or otherwise, become permanently disordered, although they may have lucid intervals, or periods when their mental unsoundness is scarcely discoverable.**

Lunacy is synonymous with insanity, and refers to that mental unsoundness which has been acquired, and is not congenital. Thus a lunatic is defined by Blackstone as a person who hath had understanding, but by disease, grief or any other cause, has become *non compos mentis*. That is, a mind so unsound as to be incapable of managing himself or his affairs.***

"Insanity is the prolonged departure, without any adequate cause, from the states of feeling and modes

*Ayres v. Ayres, 43 N. J. Eq., 565; Hudson v. Hughan, 56 Kan., 152; Smith v. Smith, 75 Ga., 477. "Imbecility or idiocy. A condition in which the organs have never been sufficiently well-conformed to permit those affected to reason correctly."—Abbott's L. Dict., Insanity.

**Lunacy is the common legal designation of insanity or the state of being *non compos mentis*."—Brown.

***A person whose mind is thus habitually disordered cannot while the disorder continues make a valid will. But a will made by such a person, during a lucid interval, will be held valid. *In re* Hoopes' Estate, 174 Pa. St., 373; *In re* Fenton's Will, 97 Ia., 192.

of thinking usual to the individual in health. The term insanity is sometimes used with so broad a meaning as to include all forms of unsoundness of mind, even idiocy. A more limited meaning excludes idiocy and the forms of imbecility, even though they may result from insanity." (Page on Wills, Sec. 103, citing Bouvier's Law Dict. "Insanity;" Lindsay v. Craft, 3 Curt., 678.

When it appears that the person is habitually insane his disability is presumed to continue, and the burden of proving a lucid interval must be assumed by him who asserts it. And it must be established by clear and satisfactory proof. While to determine whether the particular will was executed during a lucid interval is a question of fact to be determined from all the evidence.

Bouvier defines a lucid interval as "a period in which an insane person is so far free from his disease that the ordinary legal consequences of insanity do not apply to acts done therein." (Law Dict. "Insanity.") While the older theory of a lucid interval was that the mind of the person afflicted had been temporarily restored to perfect sanity.*

The standard of capacity required during the lucid interval is that required of persons habitually sane. That is, during the lucid interval, the testator must be of sufficient mind and memory to know the na-

*Attorney General v. Parnther, 3 Brown, Ch. 441; Page on Wills, Sec. 109.

ture and extent of his property, the proper objects of his bounty, and the nature of the act he is about to perform.*

The fact that the will is just and reasonable or in accordance with intentions expressed by the testator before he became insane, or that the testator subsequently gives it intelligent recognition, is evidence tending to show a lucid interval. In determining whether lunacy exists care is to be taken to distinguish physical weakness, bodily infirmities, mere weakness of mind, nervousness or reserve, which does not incapacitate, from that mental derangement of the mind which does incapacitate.

The fact that the testator commits suicide soon after the making of his will is not conclusive of lunacy, though it may tend to prove it. The test of lunacy is the presence of insane delusions, which delusions, as distinguished from those designated monomania, have become the permanent and settled condition of the mind.**

---

*Davis' Will, 91 Hun., 209; Weirs' Will, 9 Dana (Ky.), 434.

**"An insane delusion is the diseased condition of the mind in which persons believe things to exist which exist only, or in the degree they are conceived of only, in their own imaginations, with a persuasion so firm and fixed that neither evidence nor argument can convince them to the contrary."—Bouvier's Law Dict., "Delusion." Middleditch v. Williams, 45 N. J. Eq., 726; s. c. 4 L. R. A., 738; Robinson v. Adams, 62 Me., 401. "A person persistently believing supposed facts, which have no real existence, against all evidence and probability, and conducting himself upon an assumption of their

An insane delusion is said to be "a permanent and most usual symptom of insanity." (Mill's Appeal, 44 Conn., 484.) The elements characteristic of an insane delusion are: 1. A mistake of facts, whether of occurrences, of conditions, of moral duties or the consequences of the natural laws and the like;* 2, such mistake of facts must not be based upon evidence or removable by evidence. That is, if the error or mistaken conclusion is based upon evidence, although inadequate or insufficient, then it is not an insane delusion, since the sanest of persons are liable to make wrong or unjust conclusions.**

Sec. 949. SAME SUBJECT—SPECIAL FORMS OF TEMPORARY INSANITY.—To be distinguished from the fixed mental derangement which we have designated lunacy, are the following: 1. Delirium; 2. Drunkenness; 3. Dementia.

1. Delirium. Wills made while in that mental state known as "delirium," are invalid, but if made during a lucid interval, will be sustained. That is, delirum is regarded as a species of temporary insanity and subject to the same rules. Except that delirium being usually of a temporary nature, is not presumed to continue, as in the case of lunacy. So that the will of a

---

existence, is, so far as such facts are concerned, under an insane delusion."—Haines v. Hayden, 95 Mich., 332.

*Sherley v. Sherley, 81 Ky., 240; Valentine v. Proudfoot, 62 Wis., 216; Joslyn v. Sedam, 2 Cinn. L. B. (Ohio), 147.

**Petefish v. Becker, 176 Ill., 448; Potter v. Jones, 20 Oreg., 239.

person suffering from delirium would not be presumed invalid and it would have to be shown that it was made during an insane interval to invalidate.*

2. Drunkenness. The mere habit of getting intoxicated, does not incapacitate one from making a will, unless as the result of such habitual intoxication, permanent derangement of mind has resulted. Otherwise, the will of an habitual drunkard made when sober, is held valid.**

In Pierce v. Pierce (38 Mich., 412), it is held that mere intoxication at the time will not incapacitate the testator, unless it is sufficient to deprive him of the power to realize the nature of his act.

The same rule as to capacity and incapacity apply to persons accustomed to the use of drugs, as opium, morphine and the like.***

The burden of proving incapacity from delirium or drunkenness not amounting to permanent derange-

---

*Johnson's Will, 27 N. Y. Sup., 649; Williams v. Williams, 90 Ky., 28; Von de Veld v. Judy, 143 Mo., 348; Miller v. Oestrich, 157 Pa. St., 264.

**Bannister v. Jackson, 45 N. J. Eq., 593; Slinghoff v. Brunner, 174 Ill., 561; Peck v. Carey, 27 N. Y., 9; s. c. 84 Am. Dec., 220.

"As in other cases the question to be determined is solely that of the capacity of the testator at the time of making his will. The fact that he was habitually intoxicated or under the influence of drugs does not render his will invalid, if he had the requisite understanding at the time that he made it." —Page on Wills, Sec. 112, citing Wilson's Estate, 117 Cal., 262; Camp v. Shaw, 52 Ill. App., 241; Pierce v. Pierce, 38 Mich., 412, and others.

***Bush v. Lisle, 89 Ky., 393.

ment, rests upon him who alleges it, as there is no presumption of continued incapacity.

3. Dementia. By dementia, is meant that condition which results from the mere weakening or decaying of the mind. Complete dementia may closely resemble idiocy, though resulting from different causes. It is sometimes spoken of as imbecility. When it is caused by old age, it is called "senile dementia."* It is distinguishable from mania and delirium by the fact that in those cases the mind acts quickly, hurriedly and intensely, though erratically, while in this case its action is characterized by slowness or weakness.

Mere weakness of mind and loss of memory, or mere old age, does not constitute dementia, but to incapacitate the mental condition must be such as to deprive the testator of what is understood as sound mind. The question being, in cases of this kind, was the mind and memory of the testator sufficiently sound to enable him to know and understand the business in which he was engaged at the time that he executed the will?**

---

*Schouler on Wills, Sec. 131; Redf., 94; Page on Wills, Sec. 102.

**Waddington v. Buzby, 45 N. J. Eq., 173; Bever v. Spangler, 93 Ia., 576; Wilson v. Mitchell, 101 Pa. St., 495; Taylor v. Pegram, 151 Ill., 106; O'Connor v. Madison, 98 Mich., 183; Riley v. Sherwood, 144 Mo., 354. In Wilson v. Mitchell, just cited, the testator was over one hundred years old and his will was held valid.

Sec. 950. SAME SUBJECT — MONOMANIA AND INSANE DELUSIONS.—Monomania is insanity upon some particular subject or class of subjects, while in other respects the mind retains seemingly its normal powers. This does not mean, under the modern theory of monomania, that the person afflicted has perfect mental capacity on all other subjects, but simply that as regards them the affliction is not manifested.*

The test of monomania is the presence of some insane delusion in respect to a particular subject or class of subjects. As before stated, an insane delusion, is the belief in that which has no basis in reason and can not be dispelled by reason or evidence. (Middleditch v. Williams, 45 N. J. Eq., 726.)

The existence of an insane delusion or monomania, does not of itself incapacitate a testator from making a will. It does incapacitate in those cases, and those only, where the delusion or monomania enters into the product of the particular will in dispute.**

It is not enough to constitute an insane delusion that will incapacitate, that the person was laboring under a mistake of fact, or was led by false testi-

*Page on Wills, Sec. 108; Bouvier's Law Dict., "Monomania."

**Williams v. Williams, 23 S. W. Rep., 789; Henningway's Estate, 195 Pa. St., 291. In this case the testator had the insane delusion that the beneficiary under the will was Christ, and this was held to avoid the will. See also Orchardson v. Cofield, 171 Ill., 14; Rivard v. Rivard, 109 Mich., 98; 12 L. R. A., 161.

mony to believe that to exist which in fact did not exist. The delusion must spring wholly from his diseased imagination, and must be belief in that which no reasonable person could have believed.*

So mere eccentricities, oddness, prejudice, error or unjust aversion of particular persons, is not necessarily construed to be such an insane delusion as will avoid a testament. But where the prejudice or aversion has no foundation in mistaken facts, but is solely the result of a diseased imagination, it will invalidate a will evidently made because of it.**

Sec. 951. IV. DISABILITIES BY REASON OF MISTAKE, FRAUD, AND UNDUE INFLUENCE. Fraud closely resembles undue influence in most cases and is scarcely distinguishable from it.*** Fraud vitiates a will, hence where one instrument is fraudulently procured to be signed when the testator intended another, or the testator is deceived as to the contents of the will he signed, or if a legacy is given to a person who has fraudulently assumed a character not his true one, or if the particular will was the re-

*Smith v. Smith, 48 N. J. Eq., 566; Clapp v. Fullerton, 34 N. Y., 190; Haines v. Hayden, 95 Mich., 332.

**Baker v. Lewis, 4 Rawle (Pa.), 359; Petefish v. Becker, 176 Ill., 448. In this last case the testator without reason or cause for distrusting his wife, doubted the paternity of his son, and because of this doubt disinherited him; it was held that this unreasonable doubt amounted to an insane delusion which destroyed that "sound and disposing mind and memory" required to make a will.

***Page on Wills, Sec. 122; Lyon v. Dada, 111 Mich., 340; Coghill v. Kennedy, 119 Ala., 641.

sult of any other fraudulent imposition practised upon the testator the fraud will vitiate it.*

The fraud just mentioned that vitiates a will is called fraud in the execution, or the procuring the execution of a will by wilfully false statements of fact made with intent to deceive and actually causing deception, and is to be distinguished from what is styled fraud in the inducement which consists of wilfully false statements of fact intended to induce, and that perhaps do induce, the particular will in question, but which the testator executes with a clear knowledge of its character and contents.** This sort of fraud is held not to invalidate a will unless construed to amount to undue influence.*** The reason being the extreme difficulty of ascertaining in each case the effect of such deceit in influencing the mind of the testator, and the further fact that since the statutes do not provide for setting aside a will because of fraud, the doing so would be considered legislation rather than construction.

Mistake or Error. The question of mistake as applied to the subject of wills, is also usually mixed up with the questions of fraud and undue influence, and the same evidence may support and tend to prove one or all of them. Mistake, like fraud, is divided into

*Hildreth v. Marshall, 51 N. J. Eq., 241; Lyon v. Dada, 111 Mich., 340; Waite v. Frisbie, 45 Minn., 361; Jones v. Simpson, 171 Mass., 474; s. c. 50 N. E. Rep., 940.

**Page on Wills, Sec. 124.

***Orth v. Orth, 145 Ind., 184; s. c. 44 N. E. Rep., 17; Moore v. Heineke, 119 Ala., 627; s. c. 24 So. Rep., 374.

mistake in the execution, and mistake in the inducement of the will.

By mistake in the execution is meant that the testator through mistake, whether due to fraud, or incapacity, or both, has executed a will different from the one he intended or desired to make. Such a mistake invalidates the will.*

Mistake in the inducement means that although the testator is mistaken as to governing facts, as that a son for whom he neglects to provide is erroneously believed to be dead, yet he executes with full knowledge of its terms the very will in question. This mistake in inducement does not invalidate or defeat the will.** The reasons being that as the statute providing who may make a will does not state that a mistake of fact shall invalidate the will, it would be legislation for the court to do so. The other reason given is that it is an impossible undertaking for the court to say in what manner the will was affected by the mistake and to determine just what the testator would have done if the mistake of fact had not existed.*** That this reasoning is specious,

*Hildreth v. Marshall, 51 N. J. Eq., 241; Baker v. Baker, 102 Wis., 226; s. c. N. W. Rep., 453. In the first case, just cited, a will was held invalid because at the time of signing it the testator thought that it was instructions for his funeral.

**Reeves, Cases on Wills, 18 and 19; Ruffino's Estate, 116 Cal., 304; Stewart v. Jordan, 50 N. J. Eq., 733; Wenning v. Teeple, 144 Ind., 189.

***Page on Wills, Sec. 120; Martin v. Thayer, 37 W. Va., 38; White's Will, 121 N. Y., 406.

and only states difficulties for the purpose of hanging a decision thereto is obvious. For example, the testator by mistake believes his son and heir dead and therefore wills his property to others. The son is not dead. Now what prevents a court from doing justice in this case? That the rule of law in this regard is wrong is manifest by the fact that in a number of States statutes have been enacted doing away with it, by providing that any mistake of fact on the part of a testator as to the existence or conduct of an heir avoids a will so far as it affects such heir.*

A will may be refused probate when it appears that the testator did not intend it as such, or understand that it was a will. But his mistake as to its legal effect can not be shown to defeat it. (27 W. Va. 796; s. c. 55 Am. Rep. 346.)

It can not be shown by parol evidence, either to supply the omissions or to defeat the will, that legacies intended by the testator were omitted by the mistake of the draftsman. (8 Conn., 254; s. c. 20 Am. Dec. 100.)

Courts of Equity may correct mistakes in wills as to their effect where the mistake is apparent on the face of the will or can be made out by due construction of its terms, and the will itself indicates the true intention. (Dulaney v. Middleton, 72 Md., 61; 32 Me. 340, s. c.

*Jones v. Grogan, 98 Ga., 552; Mallery v. Young, 98 Ga., 728; Smith v. Olmstead, 88 Cal., 582; Forbes v. Darling, 94 Mich., 621; Thomas v. Black, 113 Mo., 66; Hill v. Hill, 7 Wash., 409; Ramsdill v. Wentworth, 101 Mass., 125; Smith v. Sheehan, 67 N. H., 344; Trotter v. Trotter, 31 Ark., 145.

52 Am. Dec. 654; Roe v. Vingut, 117 N. Y., 204; 36 Ia. 674, s. c. 4 Am. Rep. 665.)

Sec. 952. UNDUE INFLUENCE.—By "undue influence" is meant that influence which compels the testator to do that which is against his will from fear, the desire of peace, or from solicitations, over-persuasion, or coercion, which he is unable to resist.*

Undue influence may be exercised either through threats or fraud or persuasion, but to avoid the will it must destroy the free agency of the testator at the time and in the very act of making the will.**

*Johnston v. Armstrong, 97 Ala., 731. In this case undue influence is defined as "such as in some measure destroys the free agency of testator and prevents the exercise of that discretion which the law requires that a party should possess." In Coghill v. Kennedy, 119 Ala., 641, undue influence is said to exist where "any improper or wrongful constraint, machination or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not have done or forborne had he been left to act freely."

**Rollwagen v. Rollwagen, 63 N. Y., 504. The facts in this case were that, "In 1871, R., an uneducated man of great wealth, a confirmed invalid, having nearly lost the power of speech, and having three sons and a daughter by a first wife, when sixty years of age, married plaintiff, his housekeeper. His infirmities increased and during 1872, according to testimony, he could not utter an intelligent word or sound. In the spring of 1873 his old business agent was discharged, and a brother of his last wife, of scarcely any business capacity, was put in charge of all his property. A large and expensive dwelling house was purchased, and a will was drawn by an attorney employed by plaintiff's brother, she giving in presence of R., all the instructions in reference to it, claiming to understand the sounds uttered by him, but none of which were intelligible to the attorney or physician present. At the execution of the will no word or intelligible sound was uttered by

"The theory underlying the doctrine of undue influence is that the testator is induced by the various means employed . . . , to execute an instrument which, though in outward form and appearance his, is, in reality, not his will, but the will, wish and desire of some other person. Such instrument, therefore, though signed by the testator, is not executed by him *animo*

R. By this will, the new house and furniture were given to the wife in addition to her share as widow. The real estate was not to be divided until the youngest grandchild living at the death of plaintiff, should arrive at the age of twenty-one, and in the meantime the property was in control of plaintiff's brother, who was appointed executor. In September, 1873, a codicil was drawn and executed, in a similar manner to the will, in which plaintiff was devised four other houses and lots, and provision was made for a child to be born of her.

R.'s children by his former wife were not present at the execution of the will or codicil, nor knew of them. R. died about a month after the execution of the codicil. Under these facts it was held in the surrogate, supreme, and court of appeals, that probate of the will should be properly refused; that the proof failed to show that the testator understood and assented to the provisions of the instruments, and that the evidence justified a finding of undue influence. The court of appeals saying—"It is impossible to define with precision what the extent of power of one mind over another must be—to be *undue*—and it must be decided by sound principles and good sense in each case. But the influence over a testator which the law regards as undue and illegal, must be such as to destroy his free agency, it vitiates the act which is the result of it. . . . The undue influence is not often a subject of direct proof. It can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influences, the opportunity and disposition of the person to wield it, and the acts and declarations of such person." Dean v. Negley, 41 Pa. St., 312; Monroe v. Barclay, 17 O. St., 302; s. c. 93 Am. Dec., 620.

testandi. This important and inherent element is lacking."*

Mere solicitations, however importunate, do not of themselves constitute undue influence. Neither does honest persuasion, appeals to affection or gratitude, or to the ties of kindred, or for pity for future destitution; neither do fair and flattering speeches when not accompanied by fraud. To be sufficient the influence used must amount to coercion or fraud, and must have overcome the free agency, or free will, of the testator.**

Sec. 953. SAME SUBJECT—PRESUMPTIONS. —The amount of influence required to constitute undue influence, cannot be stated, it varies with the character of each case, regard being had for the age, mental capacity and strength of character of the testator. It is enough if, in the case in question, it overcame the testator's free agency. (Rollwagen v. Rollwagen, 63 N. Y., 504.)

The relations of the parties are material. Thus the law recognizes opportunities for undue influence in such fiduciary relations as those of Guardian and Ward, Attorney and Client, Physician and Patient, Religious Adviser and layman; and a will made for the benefit of the Guardian, Attorney, Physician, or Re-

*Page on Wills, Sec. 126, citing Krankel v. Krankel, 50 S. W. Rep. (Ky.), 863.

**Arnault v. Arnault, 52 N. J. Eq., 801; Haydock v. Haydock, 34 N. J. Eq., 570; Wilcoxon v. Wilcoxon, 165 Ill., 454; Bulger v. Ross, 98 Ala., 267; *In re* Langford, 108 Cal., 608; Thompson v. Ish, 99 Mo., 160; Pensyl's Est., 157 Pa. St., 465.

ligious Adviser is viewed with suspicion. And if it appears, that the beneficiary made efforts to procure the will, it will be presumed to be the result of such influence, and this presumption of fact must be rebutted by such beneficiary.*

The fact that the beneficiary drew the will is often a suspicious circumstance and in connection with other facts may raise a presumption of undue influence. (In re Smith, 95 N. Y., 517; 111 N. Y., 238.)

Bequests to persons in places or relations not fiduciary as Parent and Child, Husband and Wife, Master and Servant, do not of themselves raise a presumption of undue influence, even though the beneficiary took active steps to procure the will. But if opportunities for undue influence existed, and the provisions of the will are unnatural, such a presumption may arise. (Rollwagen v. Rollwagen, 63 N. Y., 504; Haydock v. Haydock, 34 N. J. Eq., 570.)

The mere existence of unlawful relations, between the testator and the beneficiary, do not raise a presumption of undue influence, but when coupled with other circumstances, favorable to the exercise of such influence, will raise a presumption of it.**

---

*Richmond's Appeal, 59 Conn., 226; s. c. 21 Am. St. Rep., 85; Coghill v. Kennedy, 119 Ala., 641; Bancroft v. Otis, 91 Ala., 279; s. c. 24 Am. St. Rep., 904; Hoopes's Estate, 174 Pa. St., 373; 72 Cal., 556; 1 Am. St. Rep., 84; Bennett v. Bennett, 50 N. J. Eq., 439.

**Porshett v. Porshett, 82 Ky., 93; s. c. 56 Am. Rep., 880; Monroe v. Barclay, 17 O. S., 302; Wainright v. Wainright, 89 Pa. St., 220.

Sec. 954. SAME SUBJECT—BURDEN OF PROOF.—The burden of proving undue influence rests, usually, upon him who alleges it. But where the parties stand in fiduciary relations, or the draughtsman is the beneficiary, and it appears that such beneficiary was active in procuring the will, the burden of proving that it was the voluntary act of a competent testator, rests upon the beneficiary.*

It is also held to be "a strong circumstance tending to show the absence of any undue influence when the proof fails to connect the beneficiary in the will in any way with the making of the will, either by agency, procurement, suggestion, solicitation or knowledge of its execution." (Harp v. Parr, 168 Ill., 459.) So where a testator willed his property to the daughter of the person alleged to have wielded the undue influence, and contrary to the wishes and expectations of such party, the court held that no undue influence had existed, since the influence did not cause the making of the particular will in question.**

Sec. 955. SAME SUBJECT — EVIDENCE. — While undue influence is usually divided into actual or direct, and presumptive or constructive undue influence, yet the evidence usually relied upon to prove undue influence is generally circumstantial in its char-

*Bancroft v. Otis, 91 Ala., 279; s. c. 24 Am. St. Rep., 904; Prentiss v. Bates, 93 Mich., 234; s. c. 17 L. R. A., 494; Allison's Est., 104 Ia., 130; Roberts v. Welsh, 46 Vt., 164.

**Hampton v. Westcott, 49 N. J. Eq., 522; Harp v. Parr, 168 Ill., 459; *In re* Will's Est., 67 Minn., 335.

acter. And a wide range is allowed to set before the jury all the circumstances attending the case.*

The declarations of the testator made within a reasonable time before the execution of his will, are admissible for the purpose of showing his mental condition and his exposure to undue influence. Thus his declarations at the time of the execution of the will stating how he meant to dispose of his property are admissible. (Harp v. Parr, 168 Ill., 45.)

But his declarations made after the will has been executed are not usually admissible, unless they are near enough in point of time to form part of the *res gestae;* or unless they tend to show a continuance of the conditions existing when the will was made.**

Such declarations, unless a part of the *res gestae,* "have no weight unless introduced in connection with evidence tending to prove undue influence, mental incompetency or fraud at the time of the testamentary act." (*In re* Langford, 108 Cal., 608.)

The testator's declarations may also be shown by the beneficiary to rebut the idea of undue influence, by showing that the will was in accordance with previously expressed purposes. (Kaenders v. Montague, 180 Ill., 300.)

The admissions of a sole legatee, showing undue in-

*Storer's Will, 28 Minn., 91. The question of undue influence is particularly one for the jury to determine. Caves v. Agnew, 186 Pa. St., 314.

**Page on Wills, Sec. 423; Parsons v. Parsons, 66 Ia., 754; 27 Ia., 110; 122 Pa. St., 239; Moore v. Gubbins, 54 Ill. App., 163.

fluence by him, are admissible against him, but they are not admissible, where he is not a party to the suit, or where other parties to the suit were jointly interested with him. And such declarations being admitted upon the theory that they are against interest, must have been made after the execution of the will.*

Sec. 956. SAME SUBJECT—EFFECT OF UNDUE INFLUENCE.—"In determining a case involving undue influence, the question is not what effect the influence actually exerted would have had upon an ordinarily strong and intelligent person, but what effect the influence actually exerted had upon the person on whom it was exerted, taking into consideration the time and place and all the surrounding circumstances."**

Where the whole will is affected by undue influence or fraud, it will fail as a whole. But if the fraud or undue influence affects only a part of the will, such part will fail and the rest of the will may stand.***

---

*Smith v. Henline, 174 Ill., 184; Potter's Will, 161 N. Y., 84; Livingstone's App., 63 Conn., 68; Thompson v. Thompson, 13 O. St., 356.

**Page on Wills, Sec. 126, citing Henry v. Hall, 106 Ala., 84; Mooney v. Olsen, 22 Kan., 69, and others.

***Rivard v. Rivard, 109 Mich., 98; Knox v. Knox, 95 Ala., 495; Allen v. McPherson, I. H. L. Cas., 191; Randolph v. Lampkin, 90 Ky., 551; s. c. 10 L. R. A., 87; Morris v. Stokes, 21 Ga., 552.

CHAPTER V.

WHO MAY TAKE BY WILL.

Sec. 957. THE GENERAL RULE.—As a general rule, any person may take property by will, including married women, infants and insane persons, so long as the gift in itself is not injurious.

Sec. 958. EXCEPTIONS TO THE GENERAL RULE.—Some exceptions to this general rule which were made at common law, and which prevail to some extent under modern statutes, are now to be mentioned. These exceptions include:

Aliens. At common law aliens could take a perfect title to personal property under a testament, and such property was only liable to be confiscated by the state in case of the party becoming an alien enemy.* And at common law an alien could take a valid title to real property under a will, but his title was subject to be defeated at any time by the government, or state in which he lived, taking possession of the same. In many of the states, statutes have done away with the common law disabilities imposed upon aliens, and where this has been done they are as free to take and hold property as citizens are. In a few states as Iowa, Illinois and New York, aliens are either forbidden to

*Harney v. Donohue, 97 Mo., 141; Craig v. Leslie, 3 Wheat. (U. S.), 563; Page on Wills, Sec. 150.

acquire real estate or are limited in the amount they may hold.*

Sec. 959. SAME SUBJECT—CORPORATIONS. —Under the early English law a corporation might take real or personal property by will, but later under the Statute of Mortmain, and until the Statute of Wills of I. Vict, corporations could not take real property by devise. This Statute of Mortmain has never prevailed in this country except in Pennsylvania and South Carolina for a while, so that unless restrained by express provisions of the statutes, a corporation may take by will such real or personal property as it is authorized to hold in its charter.**

In the case of devises to foreign corporations, the power to take is usually governed by the law of the state where the land lies,, though it is held that if in its home state, the corporation cannot take by devise, it

---

*Opel v. Shoup, 100 Ia., 407; Furenes v. Severtson, 102 Ia., 322; Jele v. Lemberger, 163 Ill., 338; Schultze v. Schultze, 144 Ill., 290, s. c. 19 L. R. A., 90; McGillis v. McGillis, 154 N. Y., 532.

**McGraw's Est., 111 N. Y., 66; American Bible Soc. v. Marshall, 15 O. S., 537. In South Carolina a statute similar to the Statute of Mortmain was in effect until 1872. Am. Bible Soc. v. Noble, 11 Rich. Eq. (S. Car.), 156. In Maryland by a constitutional provision a religious corporation cannot take by devise unless the Legislature sanctions it. (Church v. Smith, 56 Md., 363.) In a few States, the statutes provide that a corporation cannot hold real estate in excess of a named sum, and under this rule a devise to such a corporation in excess of the specified amount will be invalid as to the excess. (Starkweather v. Amer. Bible Society, 72 Ill., 50; Wood v. Hammond, 16 R. I., 98.)

cannot take in another state, though the laws of that state permit corporations organized, there, to take.*

Unincorporated companies may, by name, take personal property by will, but not real estate. But if the company becomes incorporated before the title is to vest, it may then take devises. So gifts to charities, or to corporations to be thereafter organized are good. (Royer's Est. 123 Cal. 614.)

Public corporations as municipalities, the state, and the like may be beneficiaries under a will.** It is a question decided both ways whether or not the United States may take property by devise.***

Sec. 960. SAME SUBJECT — SUBSCRIBING WITNESSES.—By statute in many states gifts to subscribing witnesses are void, unless there are the required number of other witnesses to the will, to whom no gift has been made.****

So it is held, on grounds of public policy, that one who murders the testator for the purpose of securing the benefit of his will, cannot be permitted to take un-

---

*Starkweather v. Amer. Bible Soc., 72 Ill., 50; contra, Amer. Bible Soc. v. Marshall, 15 O. S., 537; Thompson v. Swoope, 24 Pa. St., 474.

**Beurhaus v. City of Watertown, 94 Wis., 617; Quincy v. Attorney-General, 160 Mass., 431; Carder v. Fayette County, 16 O. S., 353.

***Dickinson v. U. S., 125 Mass., 311, holding that it can take and Fox's Will, 52 N. Y., 530; s. c. U. S. v. Fox, 94 U. S., 315, holding that it cannot.

****Lord v. Lord, 58 N. H., 7; Fowler v. Stagner, 55 Tex., 393.

der it. And a devise to any unlawful society, will not be allowed to take effect.*

Sec. 961. SAME SUBJECT — ILLEGITIMATE CHILDREN.—At common law the rule prevailed that while a parent or reputed parent to an illegitimate child could provide for it by will, others than the parents could not provide by will for future born illegitimate children, and devises by such persons were held void, the reason being that such provisions might encourage illegitimacy.**

By the modern rule the more humane policy of the civil law is followed rather than the austere one of the common law, in that illegitimate children, whether born or to be born, may be provided for by will both by their reputed parents and others, and such bequests will be valid if the beneficiary is properly described. A sufficient description is made when they are mentioned as the illegitimate children of a named mother.***

*115 N. Y., 506; 12 Amer. St. Rep., 819; 63 Pa. St., 463.

**In re Bolton, 31 Ch. Div., 542; Occleston v. Fullalove, L. R. 9 Ch., 147.

***Page on Wills, Sec. 156; School's Will, 100 Wis., 650; Hayden v. Barrett, 172 Mass., 472; Hughes v. Knowlton, 37 Conn., 429.

CHAPTER VI.

FORMALITIES REQUIRED IN MAKING WILLS.

Sec. 962. GENERAL DISCUSSION.—The subject of the formalities required in making and revoking wills, is regulated by statutes in the various states, but with some slight difference in terms the rules and regulations are substantially uniform that, except in the cases of holographic and nuncupative wills, the will must be in writing, signed, acknowledged, and in some states sealed by the testator, and its execution must be attested by two or more competent witnesses.*

Sec. 963. A WILL MUST BE IN WRITING.—By statutes in the various states governing the subject of wills, all wills both of real and personal property

*The History of Formalities in Wills. By the early English Ecclesiastical law testaments might be made orally, but later such wills were enforceable only when made under certain circumstances, and otherwise had to be in writing. Signing by the testator and witnesses were not necessary in England until the first half of the 19th Century (I. Vict., c. 26, Sec. 9.) By the Statute of Wills (32 Henry VIII.) it was required that a will in order to pass land should be in writing, but no other formalities were then required. The Statute of Frauds (29 Car. II., c. 3, Sec. 5) provided that devises of land "shall be in writing and signed by the party so devising the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of no effect." This statute did not affect testaments.

must be in writing. The only exception to this is that of nuncupative wills.

Under the early English law, wills of personal property were valid although not in writing, but by later English statutes, and by similar statutes in the various American States, wills of both real and personal property are required to be in writing, except nuncupative wills.

Sec. 963a. SAME SUBJECT, EXCEPT NUNCUPATIVE WILLS.—A nuncupative will, as we have seen (Chapter I.) is an oral will, declared by testator before witnesses as his disposition of his property, and afterwards reduced to writing. As a rule, personal property alone, and that only to a limited amount, can be disposed of by a nuncupative will.*

In a few states real property may be disposed of by a nuncupative will.**

As a rule, only certain favored persons are allowed to make nuncupative wills, and these are usually confined to two classes:

---

*"A verbal will made in the last sickness shall be valid in respect to personal estate, if reduced to writing and subscribed by two competent disinterested witnesses, within ten days after the speaking of the testamentary words; and if it be proved, by said witnesses, that the testator was of sound mind and memory, and not under any restraint, and called upon some person competent, at the time the testamentary words were spoken, to bear testimony of said disposition as his will." (Rev. Stat. O., Sec. 5991.) It must also be probated within six months after the death of the testator in Ohio.

**64 N. Car., 52; 67 Tex., 640. This was formerly the rule in Ohio, Ashworth v. Carleton, 12 O. S., 381.

1. Persons in their last sickness, or persons overtaken by sudden illness, and who have not time to make a written will, and would otherwise die intestate.

2. Soldiers in actual service and mariners at sea. And the tendency of modern statutes is to confine the privilege to the second class alone.*

No particular form of words is necessary to constitute a nuncupative will. But it must appear that the testator intended what he said to amount to a testamentary disposition, and that he desired the persons present, or some of them, to bear witness that his spoken words are his will.**

By an English statute governing nuncupative wills, at least three witnesses are required. But in the United States two are sufficient. The English statute also required that the will should be reduced to writing within a limited number of days after the words were spoken, and many of the United States have similar provisions, the time being fixed at from six to twelve days.***

*By "last sickness" or "illness" is meant the illness of which the testator dies without recovery. Martinez v. Martinez, 19 Tex. Civ. App., 661; Donald v. Unger, 75 Miss., 294. "Actual service" is held to begin when an army has reached the country of the enemy, or has begun an active campaign. Gould v. Safford, 39 Vt., 488; Pierce v. Pierce, 46 Ind., 86.

**Yarnald's Will, 4 Rawle (Pa.), 46; Harington v. Stees, 82 Ill., 50; Biddell v. Biddell, 36 Md., 630; Sampson v. Browning, 22 Ga., 293.

***There must be the required number of witnesses to a nuncupative will or it is invalid. (Vrooman v. Powers, 47 O. S., 191; Wiley's Est., 187 Pa. St., 82.) If not reduced to writing within the period fixed by the statute the nuncupative will fails. (Taylor's App., 47 Pa. St., 31; George v. Greer,

Very strict proof is required, not only to testator's capacity, but of his testamentary intent, and that the writing produced, shows clearly what his intent was. As a rule, a nuncupative will must be made by words, or signs only, and a written declaration, or a paper designed though ineffectually, to operate as a written will, will not take effect as a nuncupative will. But in a few cases, imperfect written wills have been given effect as nuncupative wills, where the incompletion by the prescribed formalities was due to the "act of God."*

The revocation or alteration of a duly executed written will cannot be effected by a nuncupative will. In the case of nuncupative wills made by persons belonging to the first class a nuncupative will will be of no effect, if testator recovers and ordinarily it will not be given effect if he had reasonable opportunity afterwards to make a written will.**

Sec. 964. WHAT IS A SUFFICIENT WRITING?—The statutes requiring the will to be in writing are satisfied by writing filled in upon a written or printed blank, or by being printed or engraved en-

---

53 Miss., 495.) The exact words need not be written down; their substance is sufficient. (Bolles v. Harris, 34 O. S., 38.)

*Ellington v. Dillard, 42 Ga., 361; Male's Will, 49 N. J. Eq., 266; Thomas v. Wall, 3 Phill., 23; Guthrie v. Owen, 10 Yerger (Tenn.) 339.

**Scaife v. Emmons, 84 Ga., 619, s. c. Am. St., 380; Prince v. Hazelton, 20 Johns, 502, s. c., 11 Am. Dec., 307; Bellamy v. Peeler, 96 Ga., 467.

tirely, or by being prepared by the typewriter or other similar process.*

The will may be written or signed with a lead pencil.** Writing upon a slate, however, has been held to be too easily altered to constitute a valid will, though this is doubtful.***

A will may be written on paper or any suitable substance; upon one sheet or several sheets if attached together, or though not attached, if connected by the evident sense of coherence of the writing.****

Where different sheets are found attached together, it will be presumed that they were so attached at the time of the execution of the will (Barnewall v. Murrell, 108 Ala. 366). It is not necessary that each sheet be signed, where there is more than one sheet, although this is sometimes done. (Cook v. Lambert, 3 Sw. & Tr. 46.)

The will may be written in any language understood by the testator, and it also may be written in a language not understood by him if he knows, or is made acquainted with the contents of the will, so as to be able to sign it *animo testandi.* (Dickinson v. Dickinson, 61 Pa. St. 401; Miltenberger v. Miltenberger, 78 Mo. 27; 8 Mo. App. 306.)

---

*Page on Wills, Sec. 159; Henshaw v. Foster, 9 Pick., 312; Temple v. Meade, 4 Vt., 535.

**Knox's Est., 131 Pa. St., 220; Harris v. Pue, 39 Md., 335.

***In re Cliff's Trusts, 2 Ch. Div., 229.

****Barnewall v. Murrell, 108 Ala., 366; Harp v. Parr, 168 Ill., 459; Bond v. Seawell, 3 Burr., 1773; Wikoff's App., 15 Pa. St., 281.

Sec. 965. SAME SUBJECT—THE FORM OF THE WRITTEN INSTRUMENT.—No particular language or form is necessary to constitute a writing a will provided the intention of the testator is manifest to thereby dispose of his property at his death, and that the instrument be executed with the statutory formalities. This intention of the testator which must be present in order that a writing may be construed to be a will is called the *animus testandi,* or intention of making a testamentary disposition.

Concerning the presence of this testamentary intention, Professor Page in his work says: "It does not necessarily mean that the word 'will' or 'testament' must be used in the transaction. A man may make his will *animo testandi,* though he is so ignorant of law that he thinks it is called a deed or a contract, or though he does not know what to call it. The test is not what he thinks is the legal name of the instrument which he is executing, but what the law calls it, in view of its nature, and of the real intention of the maker as deduced from the instrument and from all the facts and circumstances."*

Thus if intended to be testamentary in its character, a written instrument will operate as a will, though it is in the form of a deed, a letter, a contract, an order, or an assignment.** Likewise where the *animus tes-*

*Wills, Sec. 44, citing Knight v. Tripp, 49 Pac. Rep., 838; Stumpenhausen's Est., 108 Ia., 555; Smith v. Holden, 58 Kan., 535, and others.

**Sharp v. Hall, 86 Ala., 110; 11 Am. St. Rep., 28; Wuest-

tandi is not to be found in the written instrument it will be held not to be a will though the word "will" is used in the writing, as where the testator bestows real property upon his heirs in his life time in consideration of a contract for support, such an arrangement though called a will and executed as a will is not a will in law.*

"The rule is that no set form of expression is required. All that is necessary to make an instrument testamentary is that it should show, when read in connection with surrounding facts and circumstances, the testamentary intention." (Page on Wills, Sec. 58.) So an instrument may be partly a will and partly a deed, or some other instrument. And in fact a valid will may be disguised in the form of any instrument, but where statutory formalities are required, these

---

hoff v. The Germania Life Ins. Co., 107 N. Y., 580; Robinson v. Brewster, 140 Ill., 649; Mosser v. Mosser, 32 Ala., 551; Leaver v. Ganss, 62 Ia., 314; these cases hold that a writing in form of a deed may yet be held a will where such was the evident intention of the testator, and the title was not to vest until after the death of the testator. In Cowley v. Knapp, 42 N. J. L., 297, a letter was held to be a will. Coop v. Coop, in note to Thorald v. Thorald, I. Ecc. Rep., 15; Swann v. Housman, 90 Va., 816; Longer's Est., 108 Ia., 34, are examples of writings in form of contracts that were held to be wills. Comer v. Comer, 120 Ill., 420; Grand Fountain of U. C., etc. v. Wilson, 96 Va., 594; Remington v. Bank, 76 Mo., 546, are examples of orders to take effect after death of the writer, being held valid as wills. An endorsement on a promissory note in these words, "If I am not living at the time this note is paid I order the contents to be paid to A," was held a valid testament, Hunt v. Hunt, 4 N. H., 434.

*Ward v. Ward, 2 Ky. L. R., 986; 48 S. W., 411; Swann v. Housman, 90 Va., 816.

must be satisfied or the writing cannot operate as a will, whether testamentary or not in its character.

Whether the instrument in question constitutes a will or not, must be determined, by the character of its contents, rather than from its title, or any formal words which it may contain; so a competent testator may dispose of his property, appoint an executor or a guardian by words in the form of a request or a recommendation. But it must be clear from the use of such words that he intends them to govern the disposition of his property, and not merely to be used as words of advice, or explanation or guides in the disposition of his property. The rule being that the words must be actually dispositive and not merely precatory.*

The intention of the maker is the controlling inquiry, and that intention is to be gathered primarily, from the language of the instrument itself. But evidence of the surrounding circumstances is admissible to aid in determining the maker's intention in doubtful cases.**

If the instrument is designed to take effect at once and before the maker's death, it cannot be deemed a will.***

---

*In re Gaston's Est., 188 Pa. St., 374; Ferguson-Davie v. Ferguson-Davie, L. R. 15 P. & D., 109; Mitchell v. Mitchell, 143 Ind., 113; Aldrich v. Aldrich, 172 Mass., 101; Whelen's Est., 175 Pa. St., 23.

**Sharp v. Hall, 86 Ala., 110; 11 Am. St. Rep., 28; Reeves Cases on Wills, No. 21; Cawley's Est., 136 Pa. St., 628.

***President, etc., of Bowdoin College v. Merritt, 75 Fed. Rep., 480; Millican v. Millican, 24 Tex., 426; Cates v. Cates,

In discussing what instruments will be construed to be wills it is held that the subject matter of valid testamentary dispositions includes not only the property of the testator, but also the appointment of an executor to take charge of the estate of deceased, and likewise the naming of a guardian for the minor children of decedent.* Unless the written instrument aims to effect one or more of these purposes, the disposing of property, the appointment of an executor or the naming of a guardian it cannot be held a will.**

Sec. 966. SAME SUBJECT — CONTINGENT WILLS.—Whether an instrument shall operate as a will, or not, may be made to depend upon a contingency or condition. When this is the case it is called a contingent will.*** One of the most common forms

---

135 Ind., 272; Johnson v. Johnson, 103 Tenn., 32; University v. Barrett, 22 Ia., 60; Owen v. Smith, 91 Ga., 564; 18 S. E. Rep., 527; Diefendorf v. Diefendorf, 132 N. Y., 100.

*Remington v. Bank, 76 Md., 546; In re John's Will, 30 Ore., 494; Stringfellow v. Somerville, 95 Va., 701; 40 L. R. A., 623.

**Coffman v. Coffman, 85 Va., 459; in this case an instrument was denied probate because it simply disinherited a son of the maker, and did nothing further either as to disposition of property or the appointment of an executor or a guardian. So the mere recognition of certain persons, as his daughters, by the maker of an instrument, is not a will. So the appointment of an attorney to assist the executor is not a testamentary act. (Ogier's Est., 101 Cal., 381.)

***"A will is said to be contingent when the testator has in such will named some future event as a condition precedent to his will's taking effect, or upon whose happening the will never can take effect. This contingency, furthermore, is one which relates to the whole will." (Page on Wills, Sec. 60; Damon v. Damon, 8 Allen, 192.)

of contingent wills are those made by persons about to do some unusual act; as to go upon a journey or the like, and designed to take effect only in case of death while absent on such journey. The difficulty in these cases is to determine whether the contingency named, is a condition, or only the occasion which prompts the making of the will. If it is a condition, the instrument will not take effect unless the contingency happens. If it be but the occasion, the will becomes valid and operative as a testamentary disposition though the contingency never happens.*

Courts incline against construing the contingency as a condition, wherever it is possible to hold that the named event is the mere occasion for making the will. The contingency must be one appearing on the face of the instrument and can never be supplied by parol proof. So a contingency is usually held conditional, only where a specific event is named, and the con-

*Morrow's App., 116 Pa. St., 440; Magee v. McNeil, 41 Miss., 17; Goods of Porter, L. R. 2 P. & D., 22. In the Pennsylvania case just cited, the testator used this language, "I am going to town with my drill and am not feeling good, and in case I should not get back I make the following disposition," and it was held to be a condition and not fulfilled, though he became ill on the journey and was brought home and soon died. In French v. French, 14 V. Wa., 458, the language used was, "If I get drowned this morning, March 7, 1872, I bequeath," etc., and it was held to be the occasion for making the will and not a condition which would invalidate it, the event not having happened. In ex parte Lindsay, 2 Bradf. (N.), 204, the language used was, "Should anything happen to me before I reach St. Louis," and it was held to be the occasion for making the will and not a condition. See also the English case of Goods of Martin, L. R. 1 P. & D., 380.

tingency is confined, either to a time certain, or to a particular event.*

Where the contingency affects only a part of the will, and never happens, that part of the will to which the contingency applies will be invalid, but the rest of the will may stand. Thus in Damon v. Damon, 8 Allen, 192, the first bequest began, "If by casualty or otherwise, I should lose my life during this voyage, I give," etc., it was held that this condition applied only to such bequest and the remainder of the will was absolute. The courts preferring to hold such wills as contingent in part rather than as a whole.

The testator may also execute a will which shall take effect in the alternative, with reference to a specified event. (74 Pa. St. 69.)

Sec. 967. SAME SUBJECT — INCORPORATION OF DOCUMENTS.—Papers and documents may be made part of a will so as to influence its meaning by being referred to in the will itself, although not entirely copied therein. For this to be done effectually, the paper referred to must be in existence at the time of the making of the will, and not thereafter to be drawn; and such paper must be referred to in the will in such a way that it may be identified by inspection, or by the aid of parol evidence of the identity and genuineness of the document, and it must further

*Likefield v. Likefield, 82 Ky., 589; 56 Am. Rep., 908; Robnett v. Ashlock, 49 Mo., 171. Where the language was, "If I die before I return from Ireland," it was held a contingent will. (Parsons v. Lanoe, I. Ves. Sr., 189; Amb. Rep., 557.)

appear to be the testator's intention to incorporate such instrument in his will as a part thereof.* If the paper is not in existence at the time of making the will, no reference to it in the will itself can operate to incorporate it as part of the will.**

Another requisite to the valid incorporation of such a document in a will is that the document itself must correspond to the one described and intended to be incorporated in the testator's will. The absence of any one of these requirements will be a bar to the paper in question becoming a part of the will.***

The effect of a valid incorporation of a paper in a will by referring to it as above described, is to make such paper a part of the will as though it were fully set forth in the will.****

Sec. 968. SAME SUBJECT—WHAT IS A SUFFICIENT REFERENCE?—Just what will constitute a sufficient reference to a paper in order to incorporate it as part of a will is not always clear. It is held that a reference to, or description of, the document in the will is sufficient though it needs extrinsic evidence to identify such document as the one referred to. Thus

*Scillaber's Est., 74 Cal., 144; Smith v. Smith, 54 N. J. Eq.; Ford v. Ford, 70 Wis., 19; Mortgage Co. v. Moore, 150 Ind., 465; Young's Est., 123 Cal., 337; Zimmerman v. Hafer, 81 Md., 347.

**Dennis v. Holsapple, 148 Ind., 297; Chase v. Stockett, 72 Md., 235.

***Baker's App., 107 Pa. St., 318; Brown v. Clark, 77 N. Y., 369.

****Fickle v. Snepp, 97 Ind., 289; Page on Wills, Sec. 167.

where the reference was to a deed by the language—"The deed which I send you a copy of," this was held sufficient, the copy being enclosed in the same letter with the will.* So a reference to a deed is sufficient to incorporate it as part of a will if the names of the parties and the date of the deed are given, likewise a reference to a note is sufficient if the amount and the names of the parties are given.**

No reference in a will can incorporate verbal instructions which have been given to some one by the testator, since the statute requires the will to be in writing.*** Where a document is referred to by the testator for the mere purpose of identifying the beneficiary under the will, the rules of incorporation do not apply, and such document can be used for the purpose though not in existence at the time of making the will, and not specifically described.****

Sec. 969. SIGNING BY THE TESTATOR.—The Statutes of Wills quite universally require that the will shall be signed by the testator.***** The usual and

*Skerett's Est., 67 Cal., 585; Newton v. Society, 130 Mass., 91; Allen v. Boomer, 82 Wis., 364.

**Fickle v. Snepp, 97 Ind., 289; Tesler v. Simpson, 58 Ind., 83; Bizzey v. Flight, L. R. 3 Ch. Div., 269.

***Oliffe v. Wells, 130 Mass., 221; Sims v. Sims, 94 Va., 580.

****Page on Wills, Sec. 169; Dennis v. Holsapple, 148 Ind., 297; 46 L. R. A., 168; Piffard's Est., 111 N. Y., 410; 2 L. R. A., 193.

*****Remington v. Bank, 76 Md., 546. In Showers v. Showers, 27 Pa. St., 485, under an early statute where testator was prevented by sudden illness from signing or requesting another to sign his will, it was held valid.

most certain method is for the testator to sign his name in full with his own hand, but this is not indispensable, and the testator may sign, where he does so *animo testandi,* by making his mark; by writing his initials; by writing his first or Christian name only; by using a stamp, or by touching the pen which is guided by another person.* Testator may also use an assumed name, if not done with intent to deceive.** And his signature may of course be written with ink or with a pencil.***

All of the cases just mentioned are held to be a signing by the testator, but he may also sign by authorizing some one else to write his name for him in the manner prescribed by the statute. Where the language of the statute is that the will must be signed "by testator," unless the statute also provides for conditions in which the testator may authorize another

---

*In re Guilfoyle's Will, 96 Cal., 598; Thompson v. Thompson, 49 Neb., 157; Jenkins' Will, 43 Wis., 610; Plate's Est., 148 Pa. St., 65; 35 L. R. A., 102; Rook v. Wilson, 142 Ind., 24; in these cases the signature of testator was by mark. Goods of Emerson, 9 L. R. Ir., 443, upholds a signature by the stamped initials of the testator; Knox's App., 131 Pa. St., 230, holds valid a signature of testator where his Christian name alone was signed. In Wilson v. Beddard, 12 Sim., 28; Sheehan v. Kearney, 35 L.R. A., 102, a signature by testator whose hand is being guided by another was held to be a valid signing by the testator. But in Dunlop v. Dunlop, 10 Watts, 153, it was held where the mark was made by a person guiding the hand of testator who was unconscious, that this was not a valid signing by testator.

**Word v. Whipps, 28 S. W. Rep., 151.

***Knox's Est., 131 Pa. St., 220.

to sign his name this cannot be done.* The Statutes giving the power to delegate this authority must be consulted and followed in each case. As a rule, they are uniform in requiring, (a) that the signing by the authorized person must be done in the presence of the testator, (b) that such person must be expressly requested by the testator to sign for him.**

By the presence of the testator is meant the conscious presence as well as physical presence, and the term includes the same requisites as when used in reference to subscribing witnesses. By express direction of testator is meant either that the testator in so many words directs the party to sign his name to the instrument, or by acquiescence and assent to another's suggestion, or by signs, motions, gestures and conduct he directs the party to sign for him so as to satisfy the requirement, "by the express direction of testator."***

---

*Page on Wills, Sec. 174, citing In re McElwaine, 18 N. J. Eq., 499. The Ohio Statute upon this subject is: "Every last will and testament (except nuncupative wills hereinafter provided for) shall be in writing, and may be handwritten or typewritten, and such will shall be signed at the end thereof by the party making the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge the same." (Rev. Stat. of Ohio, Sec. 5916.)

**Haynes v. Haynes, 33 O. S., 598; 31 Am. Rep., 579; 111 Pa. St., 220; 17 Am. St. Rep., 798.

***Mulin's Est., 110 Cal., 252; Waite v. Frisbie, 48 Minn., 420; Haynes v. Haynes, 33 O. S., 598. A mere failure to object to someone signing his name to a will without any words

Sec. 970. SAME SUBJECT—WHO MAY SIGN FOR TESTATOR, AND HOW.—As a rule, in the absence of statutory restrictions, anyone may sign a will by express direction of testator, including subscribing witnesses and beneficiaries under the will.* The proper form of such signature should be the full name of the testator, and then the statement that it was written by the subscriber, giving his name, in the presence of the testator and at his express request. But this form is not absolutely necessary unless the particular statute requires it.** And where the statute is silent on the question, it is held that the mere signing of testator's name is sufficient. So the subscriber may write his own name first and then state that it is done for the testator, naming him.***

Sec. 971. SAME SUBJECT—WHERE THE SIGNATURE SHOULD BE UPON THE WILL.—One signature is sufficient for a will composed of several sheets, or of several documents, connected either actually or by reference. And the signature may be on a separate paper, if attached to the will.**** A mere

---

or gestures of assent is not sufficient. (Waite v. Frisbie, supra.)

*Riley v. Riley, 36 Ala., 496; McGee v. Porter, 14 Mo., 611; Toomes' Est., 54 Cal., 309.

**In re Cornelius' Will, 14 Ark., 675; Simpson v. Simpson, 27 Mo., 288.

***Haynes v. Haynes, 33 O. S., 598; Vernon v. Kirk, 30 Pa. St., 218.

****Morrison v. Turnour, 18 Ves., 175; Armstrong's Exr. v. Armstrong, 29 Ala., 538; Booth's Will, 127 N. Y., 109; Adams v. Field, 21 Vt., 256.

misnomer, or discrepancy in the signature, will not avoid the will, where it was intended to operate as the testator's signature.*

But where the statute requires it to be manifest that the name on the will is intended as the testator's signature, it is held that the name of testator in his own writing at the beginning of the will and also on the envelope containing the will, is not sufficient to satisfy such statute.**

Sec. 972. SAME SUBJECT—PLACE OF SIGNATURE AS REQUIRED BY THE STATUTES. —The statutes of most states simply require that the will shall be signed by the testator, without specifying the place of the signature. Under such statutes the signature may be on any part of the will, if it is intended as the final authentication of the whole will.***

In England and a few states the statutes require that the will shall be signed at the end or foot thereof. Where these statutes are in force they must be complied with or the will must fail. The only question arising under these statutes is as to what will be considered the end or foot of the will.****

---

*Word v. Whipps, 28 S. W. Rep., 151.

**Warwick v. Warwick, 86 Vt., 596; see also Catlett v. Catlett, 55 Mo., 330; Schermerhorn v. Merritt, 82 N. W. Rep., 513 (Mich.).

***Adams v. Field, 21 Vt., 256; Reeves Cas. on Wills, 34; Booth's Will, 127 N. Y., 109; 24 Am. St. Rep., 429.

****Glancey v. Glancey, 17 O. S., 134; Baker v. Baker, 51 O. S., 217; 124 N. Y., 455; 118 Pa. St., 37.

Sec. 973. SAME SUBJECT—CONSTRUCTION OF "AT THE END THEREOF."—Where these statutes require that the will shall be signed at the end thereof the question arises, what is to be considered the end? And it is held that the signature may be before or after the attestation clause and be valid, since this clause is not strictly speaking a part of the will.* It is also held that the leaving of blanks or spaces unfilled in the body of the will does not invalidate it, if signed at the end of the last written clause.** But where the testator leaves a blank or unfilled space between the last clause of the will and his signature, the courts differ in deciding whether the signature is at the end thereof as required by the statute. Where it is held valid, it is on the theory that the statute is designed merely to compel a signature of the testator.*** While the courts holding such signature not to be at the end, do so on the theory that the statutes are to prevent fraudulent additions to the will.****

Under such statutes any dispositive addition to the will after the signature of the testator will invalidate the will unless, (a) the addition was made after the execution and attestation of the will and is in effect a codicil, in this case if the codicil is not itself properly

---

*Goods of Mann, 28 L. J. P., 19; Goods of Cassmore L. J. P., 54; Hallowell v. Hallowell, 88 Ind., 253.

**Barnewall v. Murrell, 108 Ala., 366.

***Goods of Archer, 40 L. J. P., 80; L. R. 2 P., 252.

****Soward v. Soward, 1 Duv. (Ky.), 126; Page on Wills, Sec. 185.

signed and executed it fails, and has no bearing upon the previously executed will;* (b) and unless the addition is made before the execution of the will and is so referred to in the will proper as to be held incorporated therein by reference, when the will is held to be signed at the end thereof regardless of the addition.**

By a dispositive addition or clause, is meant one which adds bequests, or revokes bequests already made in the will. Thus adding after the signature of testator, that the testatrix is not required to give bond, is not a dispositive clause, and does not avoid the rest of the will.***

When the addition after the signature appoints an executor the courts differ as to whether or not the will is signed at the end. This being a dispositive or testamentary addition, the better opinion would seem to be that it would invalidate the will.****

It is also held under these statutes, or some of them, that where the signature of the testator is opposite the end or foot of the will, it is properly signed at the end thereof. Thus where the signature was on the lower edge of the page on which the dispositive clauses of the will were written, or where written on

*Heise v. Heise, 31 Pa. St., 246.

**Baker's App., 107 Pa. St., 381.

***Baker v. Baker, 51 O. S., 217; Andrew's Will, 162 N. Y., 1; Hays v. Harden, 6 Pa. St., 409.

****O'Neill's Will, N. Y., 516; Sisters of Charity v. Kelley, 67 N. Y., 409; these cases hold that the appointment of an executor after the signature invalidates the will. Contra, McCullough's Est. Myr. Prob. (Cal.), 76; Page on Wills, Sec. 186.

the second page opposite the last clause of the will which was written on the first and third pages, it is valid.*

Sec. 974. SEALING.—The sealing of wills, unless required by the statutes, is unnecessary, and this is so although the attestation clause, recites that the will was signed and sealed. But the addition of a seal when not required, will not invalidate the will.**

Sec. 975. ATTESTATION AND SUBSCRIPTION BY WITNESSES.—The statutes of all the states, with substantial uniformity, require that the will shall be attested and subscribed in the testator's presence by two or more competent witnesses. But where the statutes do not require this, a will need not be attested or subscribed.***

Some courts make a distinction in the meaning of attestation and subscription, holding that attestation means the observing of the acts constituting the due execution of the will, while subscription is the act of the witness in signing his name for the purpose of identifying the instrument attested.**** Other courts

*Ex parte Goods of Jones, 4 S. W. & Tr. 1; 34 L. J. P., 41; Ex parte Henry, 24 Ala., 638; Leathers v. Greenacre, 53 Me., 561; Kisecker's Est., 190 Pa. St., 476.

**Smith v. Evans, 1 Wils. (Eng.), 313; Ketchum v. Stearns, 76 Mo., 396; Williams v. Burnett, Wright (Ohio), 53.

***Kisecker's Est., 190 Pa. St., 476; Orgain v. Irvine, 100 Tenn., 193; Frew v. Clarke, 80 Pa. St., 170. Nuncupative and holographic wills are exceptions to this general statutory rule.

****Reed v. Watson, 127 Ind., 448; Walker's Est., 110 Cal., 387.

repudiate this distinction and regard the terms as practically synonymous.*

Sec. 976. SAME SUBJECT—WHAT THE SUBSCRIBING WITNESSES ARE REQUIRED TO ATTEST.—"The subscribing witnesses are required by statute for the purpose of attesting certain requisites of the will. What these requisites are depends upon the local statute. In most jurisdictions the subscribing witnesses are required for the purpose of attesting: (a) the signature of the testator, and (b) the capacity of the testator to make a will. In a few jurisdictions they are also required to attest the publication of the will."**

Unless expressly required by the statute it is not essential that the testator shall actually sign the will in the presence of the witnesses. But his acknowledgment to them of his signature, previously written, is sufficient.***

This is the rule where the State Statute is modeled after the provision in the Statute of Frauds (29 Car. II, c. 3, Sec. 5). But where the statute requires that the will must be witnessed by persons who saw testator sign, an acknowledgment by testator of a previously written signature is not sufficient unless the statute in so many words allows this to be done.**** In any

*Page on Wills, Sec. 189; Allen v. Griffin, 69 Wis., 529; Drury v. Connell, 177 Ill., 43.
**Page on Wills, Sec. 201.
***Reynolds v. Shirley, 7 Ohio, 39.
****Page on Wills, Sec. 203.

event if the testator neither signs nor acknowledges his signature in the presence of the witnesses the will is void.*

Sec. 977. SAME SUBJECT—WHAT IS A SUFFICIENT ACKNOWLEDGMENT. — The form of the acknowledgment is not particular, no formal or exact words being required; it is sufficient if the testator reads the attestation clause in the presence of the witnesess or exhibits the instrument with his signature thereon and refers to it as his will, or even without referring to it as his will, if he produces it and requests the witnesses to sign, his signature being visible to them.**

In some states it is held, that the acknowledgment of his signature by the testator is not sufficient unless the signature is actually visible to the witnesses at the time of the acknowledgment.*** But the general rule supported by the weight of authority is, that if the testator has actually signed the will, his subsequent

---

*Keyl v. Feuchter, 56 O. S., 424; Simmons v. Leonard, 91 Tenn., 183; Haynes v. Haynes, 33 O. S., 598.

**Allison v. Allison, 46 Ill., 61; Smith v. Holden, 58 Kan., 535; Turner v. Cook, 36 Ind., 129; Allen v. Griffin; 69 Wis., 529. So where the signature of the testator has been written by another person duly authorized by testator, this fact need not be explained to the subscribing witnesses, an acknowledgment of such signature by the testator is sufficient. Haynes v. Haynes, 33 O. S., 598.

***Matter of Mackay's Will, 110 N. Y., 611; 1 L. R. A., 491; Stewart v. Stewart, 56 N. J. Eq., 761. The New York rule is quite strict that the witnesses must see the testator sign or see his signature at the time of the acknowledgment.

acknowledgment of the will as his to the witnesses, is sufficient though they do not see the signature, and he does not acknowledge it to them.*

While no express form of acknowledgment is required, it is indispensable to the validity of a will, that such acknowledgment amounts to a verification of the will as authentic. In some states the form of the statute requires that the testator shall declare to the witnesses that the instrument is his will, and in such states a failure to so declare will defeat the will.

No particular form of declaration is required, and it may be made by a third person, as an attorney, in the presence of the testator and with his assent. But to satisfy the statute the testator must in some manner, inform the witnesses, that the instrument is his will and that he intends to give effect to it as such.**

In most of the states it is not essential, that the witnesses should know, either the contents of the instrument or that the instrument is a will.***

---

*Dewey v. Dewey, 1 Met. (Mass.), 349; 35 Am. Dec., 367; Simmons v. Leonard, 91 Tenn., 183; 30 Am. S. Rep., 875; Flood v. Pragoff, 79 Ky., 607; Allison v. Allison, 46 Ill., 61; Turner v. Cook, 36 Ind., 129. Professor Page (Wills, Sec. 206) says that the weight of authority under the Modern Wills Acts is that an acknowledgment by a testator is not sufficient unless the witnesses have an opportunity of seeing his signature.

**Harp v. Parr, 168 Ill., 459; Keyl v. Feuchter, 56 O. S., 424; Grimm v. Tittman, 113 Mo., 56; Radebaugh v. Shelly, 6 O. S., 307.

***Bond v. Seawell, 3 Bur., 1773; Moodie v. Read, 7 Taunt, 361; Barnewall v. Murrell, 108 Ala., 366; Canada's App., 47 Conn., 450; In re Porter's Will, 20 D. C., 493. This may be-

Sec. 978. SAME SUBJECT—WHERE, WHEN AND HOW THE WITNESSES SHOULD SIGN. —In England and some of the states the statutes require that the witnesses shall sign in the presence of the testator and in the presence of each other. But this last provision as to signing in the presence of each other is not a general one, and in most states the witnesses may sign at different times and places if each signs in the presence of the testator, and signs the same instrument without its having been altered.*

The statutes in some states expressly require that the testator shall request the witnesses to sign. This is not a common requirement, and where in force is usually satisfied by an implied request to sign from the testator. But the witnesses must sign with the knowledge and consent or acquiescence of testator.**

A witness may sign his name in full, or in part, or by his initials. He may sign by mark, or his name may be written for him by some other person in his pres-

---

come necessary by express statutory provision requiring a publication of the will as in New York and New Jersey. In Keyl v. Feuchter, 56 O. S., 424, by an *obiter dictum* it appears that the testator should acknowledge the instrument as his will, but this is not so decided by the facts in the case, and the rule in Ohio is perhaps different. See Page on Wills, Sec. 227; Williamson's Will, 6 Ohio, N. P. 79.

*Grayson v. Atkinson, 2 Ves., 454; Moore v. Spie, 80 Ala., 129; Lane's App., 57 Conn., 182; 4 L. R. A., 45; Patterson v. Ransom, 55 Ind., 402.

**Mullin's Est., 110 Cal., 252; Payne v. Payne, 54 Ark., 415; Coffin v. Coffin, 23 N. Y. 9.

ence and by his direction.* Although it is sometimes held that since the codes do not provide that the signature of a witness may be written by another person properly authorized so to do, that the signature of a witness so written though in the presence of the testator is insufficient.** A witness may also write a description of himself, which, if so intended, will answer for his name. So the witness's hand may be guided by another person, or he may touch the pen with which another writes his name.

Usually the statutes do not require the witnesses to sign at any particular place on the will, and if the required number have signed somewhere on the will with the intention of attesting it, this is sufficient; it being held that "subscribed" has not the same meaning as it has when used in the Statute of Frauds, regarding the signature of a party, where it means to write beneath or at the end of the instrument. All that is necessary under the Wills Act is that the signatures of the witnesses be affixed *animo attestandi.****

In a few states, by statute, the witnesses are required to sign at the end of a will, and this provision

*In re Christian, 2 Rob. Ecc. Rep., 110; Jackson v. Van Duzen, 5 Johns (N. Y.), 144; Garrett v. Heflin, 98 Ala., 615; Gillis v. Gillis, 96 Ga., 1; Schnee v. Schnee (Kan.), 60 Pac. Rep., 738; Lord v. Lord, 58 N. H., 7.

**_In re_ White, 7, Jur. 1045; Riley v. Riley, 36 Ala., 496; McFarland v. Bush, 94 Tenn., 538; Horton v. Johnson, 18 Ga., 396.

***Page on Wills, Sec. 221; Potts v. Felton, 70 Ind., 166; Franks v. Chapman, 64 Tex., 159; contra, Soward v. Soward, 1 Duv. (Ky.), 126.

must be regarded or the will fails.* In any case the witnesses should sign either upon the same sheet with the testator, or upon some paper physically annexed to that sheet.** It is likewise imperative that wherever the witnesses sign, they must do so with the intention, and for the purpose of attesting the will. So if the witnesses' signatures appear to attest certain interlineations and not the will it is insufficient.***

Sec. 979. SAME SUBJECT—WHAT IS MEANT BY "IN THE PRESENCE OF TESTATOR?"—It is a quite general requirement of the Wills Acts in the various states that the witnesses attesting the execution of a will should sign in the presence of the testator, and so it bcomes important to consider what is meant by this. It is to be observed that this term "presence" is used in connection with a testator who has another sign his name for him, also where he is required to sign in the presence of the attesting witnesses, and in the present case, with the same meaning and effect. Professor Page states that the term "presence" involves two ideas; (a) mental cognition of the act, (b) physical contiguity.**** That is, that the testator must be in a position to mentally grasp what is going on, by being conscious and informed of the act in progress, as well as to be so near in person to the witnesses as to

*Conway's Will, 124 N. Y., 455; Vogel v. Lehritter, 139 N. Y., 233.

**Fowler v. Stagner, 55 Tex., 393.

***In re Cunningham, 1 S. & S., 132; Boone v. Lewis, 103 N. Car., 40; Peake v. Jenkins, 80 Va., 293.

****Page on Wills, Sec. 209.

be able to observe their actions by his different senses.*

A witness will be deemed to have signed in the presence of the testator, if he signs where the testator could see him if he so desired.** This holding is further construed to mean that the testator must be able to see the witness sign without going to any unreasonable effort to do so.***

When the witness signs in the same room with the testator, it will be presumed that the testator could have seen him sign if he desired. But this presumption may be overthrown by evidence.**** Likewise where the witness signs in another room, it is the presumption that it was not done in testator's presence. But it may be shown, that though done in another room, the signing was done where the testator could have seen it without changing his position or location, or without an unreasonable effort on his part, it then will be sufficient.*****

Where the testator is blind, or so physically weak, that he could not see the signing, though done within the vision of a sound person, the will must be signed,

*Page on Wills, Sec. 209, citing Walters v. Walters, 89 Va., 849; Waite v. Frisbie, 45 Minn., 361; Green v. Green, 105 Ill., 264; Walker v. Walker, 67 Miss., 529, and others.

**Walker v. Walker, 67 Miss., 529; Maynard v. Vinton, 59 Mich., 139; Hamlin v. Fletcher, 64 Ga., 549.

***Baldwin v. Baldwin, 81 Va., 405; Turner v. Cook, 36 Ind., 129; Watson v. Pipes, 33 Miss., 451.

****Ayers v. Ayers, 43 N. J. Eq., 565.

*****Lamb v. Girtman, 26 Ga., 625; Hopkins v. Wheeler (R. I.), 45 Atl. Rep., 551; Cook v. Winchester, 81 Mich., 581.

if possible, where he can take cognizance of the act by his other senses.*

A few cases go still further and hold, that if the witnesses sign within the hearing, knowledge, and understanding of the testator, and so near to him, as not to be substantially away from him, it is sufficient, though the witnesses sign where the testator could not see them.**

It is held by the weight of authority, under the rule that the testator must see the witnesses sign, that he should see something tangible in connection with their signing, as the paper, the motion of the pen, or the like.*** But it is unnecessary for him to see the letters of the signature as they are written.

---

*Riggs v. Riggs, 135 Mass., 238; Reynolds v. Reynolds, 1 Spears (S. Car.), 253; In re Piercy, 1 Rob., 278.

**Riggs v. Riggs, 135 Mass., 238; Smith v. Holden, 58 Kan., 535; Cunningham v. Cunningham, 83 N. W. Rep., 58; Sturdivant v. Birchett, 10 Grat. (Va.), 67; Cook v. Winchester, 81 Mich., 581.

In this last case the provision of the Michigan Statute, which requires that the will should be attested and subscribed in the presence of the testator by two or more competent witnesses, was held to be satisfied where the witnesses subscribed their names in another room, but within the hearing, knowledge and understanding of the testatrix, after which they returned to her room, and the will, consisting of one sheet of paper, was read over and the signatures of the witnesses shown to her, and she was informed by one of them in the presence of the other that the will had been signed by them, the testatrix replying, "It is all right, and just as I want it; the witnesses and everything are all right."

***Knox v. Knox, 10 Gratt. (Va.), 106; Burney v. Allen, 125 N. C., 315; Ayers v. Ayers, 43 N. J. Eq., 565; Graham v. Graham, 10 Ired. (N. C.), 219.

Where the witnesses have failed to sign in the presence of the testator and the rule of construction requires it, they cannot afterwards acknowledge their signatures in the presence of the testator so as to overcome the objection. And this is so although they retrace their names with a dry pen in the presence of the testator.*

There is some conflict of authority as to the order in which the witnesses may sign in connection with the testator. Where the testator and the witnesses sign substantially together, so that the signing by all is contemporaneous in point of time, it will not invalidate the will though one or more of the witnesses signed before the testator. But the witnesses must remain to see the testator sign.**

Sec. 980. SAME SUBJECT—THE ATTESTATION CLAUSE CONSIDERED.—It is the rule to conclude a will with a formal attestation clause, but such a clause is not necessary to the validity of the will, although its presence may aid the recollection of the witnesses, or in the event of their failure to recollect the circumstances of the execution it may be suf-

*Mendell v. Dunbar, 169 Mass., 74; Duffie v. Corridon, 40 Ga., 122; Goods of Maddock, 43 L. J. P., 29; L. R. 3 P. & M., 169.

**Gibson v. Nelson, 181 Ill., 122; Moale v. Cutting, 59 Md., 510; Kaufman v. Caughman, 49 S. Car., 159; Mundy v. Mundy, 15 N. J. Eq., 290; contra, Goods of Olding, 2 Curt. Ecc., 865; Brooks v. Woodson, 87 Ga., 379; 14 L. R. A., 160; Simmons v. Leonard, 91 Tenn., 183.

ficient to raise a presumption of due execution.* But such a presumption is only *prima facie,* and a formal attestation clause will not prevail over positive proof of the absence of due execution.**

Some statutes require that the residences of the witnesess be placed opposite their signatures, but this provision while valuable to be conformed to, is held to be directory only, and if not complied with the will is still valid.***

Sec. 981. SAME SUBJECT.—WHO ARE COMPETENT SUBSCRIBING WITNESSES?—The Statutes of Wills require that a will shall be attested by "competent" or "credible" witnesses. These words being held to have practically the same meaning.****

---

*Baskin v. Baskin, 36 N. Y., 416; Berberet v. Berberet, 131 Mo., 399; Hallowell v. Hallowell, 81 Ind., 251. In the last case it is held that a will containing an unsigned attestation clause or an incomplete one is not therefore to be held invalid on the ground that the testator did not intend to have it operate as a will.

**Swain v. Edmunds, 54 N. J. Eq., 438; In re Hunt, 110 N. Y., 278; Deupree v. Deupree, 45 Ga., 415.

A common form of the attestation clause is—"The above instrument; consisting of —— pages, was at the date thereof, signed, sealed, published, and declared, by the said testator, A. B., as and for his last will and testament, in the presence of us; who at his request, and in his presence, and in the presence of each other, have attested the same and subscribed our names as witnesses thereto." (Signed.) C. D., E. F.

***Dodge v. Finlay, 57 N. Y. Sup., 791; Succession of Justus, 47 La. Ann., 302.

****See Rev. Stat. of Ohio, Sec. 5916; Amoury v. Fellows, 5 Mass., 219; Hall v. Hall, 18 Ga., 40; Fisher v. Spence, 150 Ill., 253; Gamble v. Butchee, 87 Tex., 643.

The requirements as to competency refer to the time of making the will, and not to the time when the witness is called upon to testify.*

In general, to be competent, the witnesses must be of the age of discretion, though not necessarily of full age, and they must be disinterested and credible in the sense that their evidence would be admissible in a court of probate.**

Sec. 982. SAME SUBJECT—WHAT INTEREST WILL DISQUALIFY A PERSON AS A WITNESS?—The interest which will disqualify, must be a present, certain, legal, and vested interest, and not merely an uncertain or contingent one.***

An interest as an executor under the will, or in any other purely fiduciary capacity, does not disqualify;**** nor does a remote interest, such as that of a

---

*Harp v. Parr, 168 Ill., 459; Smith v. Jones, 68 Vt., 132; Thorpe v. Bestwick, 6 Q. B. D., 311; 44 L. T., 180; Jenkins v. Dawes, 115 Mass., 399; Warren v. Baxter, 48 Md., 193; Vrooman v. Powers, 47 O. S., 191.

**Carlton v. Carlton, 40 N. Y., 14; Jones v. Tebbetts, 57 Me., 574; Nixon v. Armstrong, 38 Tex., 296; Lord v. Lord, 58 N. H., 7.

***Smalley v. Smalley, 70 Me., 545; Grimm v. Tittman, 113 Mo., 56; Hoopes' Will, 102 Wis., 54; Slingloff v. Bruner, 174 Ill., 561.

****Baker v. Bancroft, 79 Ga., 672; Sears v. Dillingham, 12 Mass., 358; Holt's Will, 56 Minn., 33; Society, etc. v. Loveridge, 70 N. Y., 387; formerly the rule was different, see Tucker v. Tucker, 5 Ired. L. (N. Car.), 161; Wilkins v. Taylor, 8 Rich. Eq. (S. Car.), 291.

pew holder in a church, or the inhabitant of a town which is the beneficiary.*

Where the witness is clearly disqualified by being beneficially interested in the will, an attempt is sometimes made to validate the will by having such witness release his interest under the will. The decisions are in conflict as to the effect of such a release, the majority holding that the release is not effective, since the witness must be competent at the time of subscribing.** In many states, by statutory provision, where a beneficiary under the will acts as a subscribing witness, the gift to such witness is void unless there are the required number of competent witnesses without him. By thus avoiding his interest such a witness is made competent. It is also frequently a provision of such statutes that the gift to the subscribing witness will not be void, if he gets no more than he would have taken if there had been no will.***

Neither the wife of the testator, nor the husband of the testatrix, were qualified at common law to attest the will of the other, but this rule is altered or modified

---

*Jones v. Habersham, 63 Ga., 146; Will's Est., 67 Minn., 335; Marston v. Judge of Probate, 79 Me., 25.

**Page on Wills, Sec. 195; Fisher v. Spence, 150 Ill., 253; Smith v. Jones, 68 Vt., 132; contra, In re Wilson, 103 N. Y., 374.

***Davis v. Davis, 43 W. Va., 300; Kumpe v. Coons, 63Ala., 448; In re Noble, 124 Ill., 266; Clark v. Clark, 54 Vt., 489. In several States such a witness has the option of releasing his interest or of avoiding the will. Nixon v. Armstrong, 38 Tex., 296; Grimm v. Tittman, 113 Mo., 56.

in many states.* It was the rule at common law that neither the husband or wife could act as a subscribing witness to a will under which the other was the beneficiary.** This rule is also changed by modern statutes in two ways: (a) by making husband or wife a competent witness where the other party is interested and so competent to attest such a will, and (b) by making a gift to a subscribing witness void. In this latter case there is some conflict of authority as to the gift being void when the husband or wife of the beneficiary is the attesting witness.***

Sec. 983. NUMBER OF WITNESSES REQUIRED TO ATTEST A WILL.—The number of witnesses is fixed by the statute of each state, and must be conformed to in every case. The number is rarely less than two, or more than three.****

Sec. 984. THE PUBLICATION OF A WILL.—We have seen (Ante, Sec. 976) that the witnesses are

*Pease v. Allis, 110 Mass., 157; Dickinson v. Dickinson, 61 Pa. St., 401.

**Hatfield v. Thorp, 5 B. & Ald., 589; Sullivan v. Sullivan, 106 Mass., 474; Key v. Weathersbee, 43 S. Car., 414; 49 Am. St. Rep., 846.

***Page on Wills, Sec. 198. In Fisher v. Spence, 150 Ill., 253; Sullivan v. Sullivan, 106 Mass., 474, it is held that the gift is not void and the husband or wife of beneficiary therefore not a competent witness; contra, Key v. Weathersbee, 43 S. Car., 414; Winsloy v. Kimball, 25 Me., 493.

****Poore v. Poore, 55 Kan., 687; Simmons v. Leonard, 91 Tenn., 183; Gay v. Sanders, 101 Ga., 601. It does not affect the validity of the will if more than the required number sign as witnesses.—Scattergood v. Kirk, 192 Pa. St., 263; Boone v. Lewis, 103 N. Car., 40.

in some states required to attest the publication of the will by the testator. This is the case in those states where the publication of the will is made imperative by statute. By publication of a will is simply meant that the testator makes known in the presence of the witnesses that the instrument about to be signed is his will.* No exact form need be followed by the testator in the publication of his will, and it is sufficient whether made in words or by acts and gestures or by adopting and assenting to a statement of a third person as to the character of the instrument.** It is immaterial whether the publication precedes or follows the signing of the will, and the contents of the will need not be read to the witnesses.*** But the acknowledgment of his signature by the testator is not a publication, where the statute requires both an acknowledgment and publication.****

Sec. 985. FORMALITIES REQUIRED IN HOLOGRAPHIC WILLS.—As we have seen (Ante, Sec. 925), a holographic will is one written entirely by the testator and signed by him. By reason of these facts, which tend to show not only that the will is

*Page on Wills, Sec. 225; Thompson v. Stevens, 62 N. Y., 634; Hildreth v. Marshall, 51 N. J. Eq., 241.

**In re Beckett, 103 N. Y., 167; Elkinton v. Brick, 44 N. J. Eq., 154; 1 L. R. A., 161; Hildreth v. Marshall, 51 N. J. Eq., 241; Denny v. Pinney, 60 Vt., 524.

***Jackson v. Jackson, 39 N. Y., 153; Ayres v. Ayres, 43 N. J. Eq., 565; Voorh's Will, 125 N. Y., 765.

****Ludlow v. Ludlow, 36 N. J. Eq., 597; Baskin v. Baskin, 36 N. Y., 416.

executed *animo testandi*, but that it is unquestionably the desired disposition by the testator, in a number of states such wills are valid without subscribing witnesses and the usual proofs of a formal execution.* In order that this may be done such will must be written entirely in the hand writing of the testator including the date of the will, so that a will written on a printed form can not be upheld as a holographic will.** Where certain words not in the hand writing of the testator can be rejected from the will without altering its sense, the rest may stand as a holographic will.***

In other states, not founded on the civil law, a will in the hand writing of the testator is required to be signed by witnesses and executed as other wills.

Where holographic wills are allowed by statutes, other provisions are usually enacted governing their making, as that such wills must be dated, and in some states that the signature of the testator must be at the end of the holographic will, and must be found after his death among his "valuable papers."****

*Soher's Est., 78 Cal., 477; Morris v. Morten, 20 S. W. Rep., 287; Robertson's Succession, 49 La. Ann., 868. Holographic wills are derived from the civil law and prevail in those States where the Roman or civil law was in force and in a few other States which have adopted similar statutes. Pearson's Est., 99 Cal., 30.

**Robertson's Succession, 49 La. Ann., 868; Rand's Est., 61 Cal., 468.

***McMichael v. Bankston, 24 La. Ann., 451; Vanhille's Succession, 49 La. Ann., 107.

****The date may appear anywhere on the will, but must include the year, month and the day.—Martin's Est., 58 Cal.,

Sec. 986. CODICILS DEFINED AND EXPLAINED.—A codicil is some addition to, or qualification of, a will.* It requires the same capacity, must be executed with the same formalities, and is governed by the same rules, as the will of which it forms a part.** A codicil may add to, subtract from, alter, explain, confirm, re-execute, revive or republish, any will with which it can be incorporated.*** And there may be a number of codicils to the same will.

In construing a will with codicils all the papers are to be taken together, as constituting one instrument. So far as it is inconsistent with, or repungant to, the terms of a will, the codicil will govern; otherwise the original will remains unaffected by the codicil.****

530; Zerega v. Percival, 46 La. Ann., 590; Armant's Will, 43 La. Ann., 310; 26 Am. St. Rep., 183, hold that the provision as to signing at the end must be followed. As to the meaning of valuable papers, see Hughes v. Smith, 64 N. Car., 493; Little v. Lockman, 4 Jones (N. Car.), 494.

*See Sec. 926.

**Heise v. Heise, 31 Pa. St., 246; Barnes v. Crowe, 1 Ves. Jr., 485; Shaw v. Camp, 163 Ill., 144; Pope v. Pope, 95 Ga., 87.

***Hobart v. Hobart, 154 Ill., 610; Gilmore's Est., 154 Pa. St., 523; Skinner v. Am. Bible Soc., 92 Wis., 209; Vogel v. Lehritter, 139 N. Y., 223. However, a holographic, and unattested codicil, will not republish a previous will, not written by the hand of the testator.—Sharp v. Wallace, 83 Ky., 584.

****Newcomb v. Webster, 113 N. Y., 191; Reeves Cases on Wills, No. 41; Rhode's Est., 147 Pa. St., 227; Collier v. Collier, 3 O. S., 369; Pendergast v. Tibbetts, 164 Mass., 270. In Grimball v. Patton, 70 Ala., 626, it is said, "The codicil is part of the will, and they must be construed together as one instrument. If the codicil expressly revokes any part of the will, then the part revoked must be stricken out. If any part or clause of the codicil be irreconcilably repugnant to a clause or

The codicil operates as a recognition, of the existence of the will; it may therefore republish and confirm a will, or may cure defects in its execution, or give it new life, when otherwise it would be of no effect.* In this event the will thereafter speaks as of the date of the republication. To have this effect the codicil must refer to the will with such certainty as to identify it, but it is not essential that the two papers be attached together, or that the codicils be written on the same paper which contains the will.**

One difference of construction exists between a codicil and a new will, namely: the codicil republishes the prior will, so far as it does not revoke it; while the new will, if it provides for full disposition of the testator's estate, revokes the whole of the original will.

---

clauses of the will, then to that extent the codicil supplants the will, and the latter becomes inoperative. But it supplants the will only to the extent that the repugnancy is irreconcilable."

*Shaw v. Camp, 163 Ill., 144; Skinner v. Am. Bible Soc., 92 Wis., 209; McCurdy v. Neall, 42 N. J. Eq., 333.

**Pope v. Pope, 95 Ga., 87; Barney v. Hayes, 11 Mont., 571; Whiting's App., 67 Conn., 379; Tanton v. Keller, 167 Ill., 129. The last case cited holds that legacies in the will which have been adeemed before the execution of the codicil are not made valid by such codicil.

CHAPTER VII.

FORMALITIES REQUIRED IN REVOKING WILLS.

Sec. 987. WHAT IS MEANT BY REVOCATION.—By revocation, is meant the avoiding, or invalidating of an instrument, which would otherwise have operated at the death of the testator as his will. The effect of revocation is to make the will so revoked a nullity, and unless the testator makes other testamentary dispositions, he will die intestate.*

Sec. 988. GENERAL REQUISITES OF REVOCATION.—During the life time of the testator, the will is ambulatory, and may be revoked, altered or superseded by him at any time. This, as we have seen (Ante, Sec. 924), is one of the essential characteristics of a will.

To effect a revocation, the testator must have the same capacity which is required for making a will. So that a revocation made while the testator is lacking in this capacity, or which was brought about by undue influence, fraud, or duress will not be given effect. This is also true of a revocation made under a mistake of fact, or of law.**

---

*Revocation. "A recalling. A cancellation. That which renders inoperative. The act of revoking. The cancellation of an act or instrument in writing. Repeal."—English's Law Dictionary. Page on Wills, Sec. 244.

**Rich v. Gilkey, 73 Me., 595; Mendinhall's App., 124 Pa.

Sec. 989. HOW REVOCATION IS EFFECTED. —The revocation of a will may be effected in one of two ways: 1. By the direct act of the testator. 2. By inference at law, from the acts or change of conditions of the testator, as regards his estate and family relations.

Sec. 990. SAME SUBJECT—BY DIRECT ACT OF TESTATOR.—This subject is controlled by statutes in the various states, which provide in substance, that the will shall be revoked only by some subsequent will, codicil, or writing, executed with the same formalities required in the execution of a will; or by burning, tearing, cancelling or obliterating with the intention of revoking, by the testator, or by some person in his presence and by his direction.*

St., 386; 10 Am. St. Rep., 590; Burns v. Burns, 4 Serg. & Rawle (Pa.), 295.

In Rich v. Gilkey, supra, it is said that the destruction of a will by a person not possessing testamentary capacity, is not a revocation of it. "There must be *animus revocandi,* and such person does not and cannot possess an intention of revocation any more than an insane person can." So where the destruction of a will by testator is the effect of the exercise upon his mind of undue influence, it is not a revocation of the will.

*History of the law of revocation. The Statute of Wills made no provision for the revocation of a will by the testator, and the doctrine began by judicial construction of the acts of the testator in declaring his intention to revoke his previous will. And at first oral declarations of intention to revoke was held sufficient. (Burton v. Gowell, Cro. Eliz. pt. 1, 306; Matthews v. Warner, 4 Ves. Jr., 186.) In the last case the court discovered an attempt to revoke a will by fraudulent evidence as to testator's oral declarations, and shortly afterwards by the Statute of Frauds the matter of revocation was dealt with

Concerning the state statutes upon the subject of revocation, Professor Page says: "While different in detail, these statutes agree in this: that apart from the methods of revoking a written will laid down by the statutes, no revocation is possible. Accordingly, the mere wishes and declarations of testator can never effect a revocation, no matter how clear may be testator's intention to revoke his will. . . . These statutes, however, prescribe formalities only for revocation by act manifest on the will. They do not affect the other classes of revocations, as by later instrument, by alteration of testator's estate, and by change of circumstances."*

Although the statute governing revocation may work a hardship, it must be followed as a mere expression of intention by word of mouth to revoke a will is not

---

and it was provided that no revocation of a written will could be effected "otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by testator himself, or in his presence and by his directions and consent." And that no written testament should be revoked "by any words, or by will, by words of mouth only, except the same be in the life of testator committed to writing and after the writing thereof read unto the testator, and allowed by him and proved to be done by three witnesses at the least."—29 Car. II., c. 3, Sec. 6 and 22. It is these sections of the Statute of Frauds that have been enacted in the various States with such alterations and amendments as have been found expedient in practice.

*Atkinson v. Morris (1897), P. 40; Slaughter v. Slaughter, 81 Ala., 418; Kent v. Mahaffey, 10 O. S., 204; Taylor v. Pegram, 151 Ill., 106.

effective because it does not comply with the statutory requirements.*

It follows that a written will can not be revoked by a nuncupative will (Brook v. Chappell, 34 Wis., 405; McCune v. Hause, 8 Ohio, 144).

Sec. 991. SAME SUBJECT—WHAT CONSTITUTES REVOCATION BY BURNING, TEARING, ETC.—By burning as an act constituting revocation, is not meant that the whole will must be destroyed but simply that the mark of fire should visibly show on the instrument. So where it was the envelope

*Hoitt v. Hoitt, 63 N. H., 475; 56 Am. Rep., 530; Kent v. Mahaffey, 10 O. S., 204. In the Ohio case just cited—"A testator, being blind, told J. to bring him his will, and J. handed it to testator inclosed in an envelope with three seals. Testator, having felt the seals, handed it back, with the seals unbroken, to J., directing him to throw it into the fire and burn it. J. pretended to do so, but, in fact, put the will into his pocket, and threw another paper into the fire, calling upon testator to listen and hear it burn, and the testator, smelling the paper burning, believed the will destroyed, as he had directed, and died in that belief. After testator's death the will was produced and admitted to probate. Held: That such facts do not amount to a revocation under the statute, no sign or symbol of such attempted revocation appearing upon the paper itself."

This case was under the following statute: "A will shall be revoked by the testator tearing, canceling, obliterating, or destroying the same—with the intention of revoking it—by the testator himself, or by some person in his presence, or by his direction; or by some other will or codicil, in writing, executed as prescribed by this title; or by some other writing, signed, attested, and subscribed, in the manner provided by this title for the making of a will, but nothing herein contained shall prevent the revocation implied by law, from subsequent changes in the condition or circumstances of the testator."—Rev. Stat. of Ohio, Sec. 5953.

covering the will that showed signs of burning and the will did not, it was held not to be a revocation; neither is it a revocation if some other paper is burnt supposing it was the will.*

Tearing includes cutting, and again it is to be noted that the whole instrument need not be torn if the injury by tearing is manifest, and done with the intention of revoking, it complies with the statute though very slight in extent. None of the words need be torn off.**

Cancelling, by modern holdings is sufficient to revoke a will where done with that intent, if lines are drawn through a part of the written will, and these may be lead pencil lines. So where words in the will were erased, and where a seal and part of the signature of testator were torn off and the rest of the signature erased in each case it was held sufficient.*** Whether writing the word "cancelled" with the intention of revoking the will constitutes a sufficient act, seems to depend upon where it is written. If written across the face of the instrument it amounts to a can-

*Bibb v. Thomas, 2 Wm. Bl., 1043; Doe v. Harris, 6 Ad. & El., 209; 33 E. C. L., 299; Kent v. Mahaffey, 10 O. S., 204; Mundy v. Mundy, 15 N. J. Eq., 290.

**Brown's Will, 1 B. Monr. (Ky.), 56; Clarke v. Scripps, 2 Rob., 563; Sanders v. Babbitt, 51 S. W. Rep., 163; Evan's Will, 58 Pa. St., 238.

***Olmstead's Est., 122 Cal., 224; Miles' App., 68 Conn., 237; White's Will, 25 N. J. Eq., 501. The older rule was that the cancellation must consist of crossed lines on the words or paper so as to deface the writing. See Warner v. Warner, 37 Vt., 356.

cellation.* While if the writing of the word "cancelled," or words of similar import, is upon the margin of the will or upon the back of a page of the will it is held not to be sufficient to constitute a revocation.**

In general to constitute revocation by burning, tearing, obliterating, mutilating, cancelling and the like, there must be first, an intention to revoke on the part of the testator, hence a destruction of an instrument by mistake, or fraud or without testator's consent does not amount to a revocation.*** So a destruction made under a misapprehension of facts, as where the testator destroyed the will simply because he erroneously believed that it was defectively executed, is not a revocation.****

So where a testator having begun the destruction of his will, with the intention of destroying it and before the act is completed changes his intention and preserves the will, it does not amount to a revocation (Giles v. Warren, 41 L. J. P. 59; L. R. 2 P. 401).

Where the intention of the testator to destroy his will, and thus revoke it, is frustrated by the fraud of some third person who prevents him from doing so,

---

*Evan's Est., 58 Pa. St., 238; Warner v. Warner, 37 Vt., 356.

**Lewis v. Lewis, 2 W. & S., 455; Ladd's Will, 60 Wis., 187.

***Olmstead's Est., 122 Cal., 224; Batton v. Watson, 13 Ga., 63.

****Giles v. Warren, L. R. 2 P., 401; 41 L. J. P., 59; Powell v. Powell, L. R. 1 P., 209.

as by fraudulently preserving a will which the testator ordered and believed destroyed, the cases are directly in conflict, the weight of authority seeming to be that the will is not thereby revoked and that to hold it so would be adding to the statute by judicial legislation.* Other cases hold that the intention of the testator being clear to revoke the will and the actual destruction being prevented by fraud, the will is to be deemed revoked. And the author believes that these cases are right in principle, for fraud in preventing a revocation should be met by the courts just as much as the fraud or undue influence which induces the making of a will.

If the testator with the intention of revoking a will, tears it in pieces or actually begins to burn it, and it is then preserved by a third person, without the testator's knowledge and consent, it will be deemed to be revoked. But there must be some actual overt act of destruction, and not a mere unexecuted intention to destroy, or the preservation of the will may operate to prevent revocation.**

But if the testator acquiesces in the preservation of the will, there is no revocation. The extent of the destruction, obliteration, or cancelling required, depends

*Kent v. Mahaffey, 10 O. S., 204; Graham v. Burch, 47 Minn., 171; Boyd v. Cook, 3 Leigh (Va.), 32; Contra, Card v. Grinman, 5 Conn., 169; Prior v. Coggin, 17 Ga., 444; Smiley v. Gamball, 2 Head (Tenn.), 164.

**Cheese v. Lovejoy, 46 L. J. P.,66; 2 Pro. Div.,251; Lovell v. Quitman, 88 N. Y., 377; Gay v. Gay, 60 Ia., 415; 47 Minn., 171; 28 Am. St. Rep., 339.

largely on the statute, but more largely upon the intention of the testator. Where the whole will is physically destroyed, there can be no question of its revocation; but, equally, where such is the intention, the tearing off of a seal, cutting out or cancelling the name, tearing the instrument in two and the like acts, have been held sufficient to constitute a revocation.*

No witnesses are required to a revocation of a will by this method when it is done by the testator himself, though where done by a third person, in his presence and by his direction, the statutes in some states require witnesses. Usually the whole will only can be destroyed by this method. But in some states a single clause or more may be so revoked, leaving the remainder of the instrument stand.** But the alteration or cancellation of parts of a clause in the will, thereby changing the legal effect, as by changing a life estate

---

*Woodfill v. Patton, 76 Ind., 575; 40 Am. Rep., 269; Gay v. Gay, 60 Ia., 415; Tomlinson's App., 133 Pa. St., 245.

**This doctrine of partial revocation is deduced from that clause in the Statute of Frauds which provides that a will devising lands, "or any part thereof," may be revoked by the testator in the manner mentioned. In the States that have a similar statute the holding follows that a will may be revoked in part. Except in Massachusetts, where the State statutes do not provide for partial revocation, and the words or portions stricken out are not rendered illegible, the entire will may be probated, while if the parts cancelled are illegible and the intention is clearly not to revoke the whole will such parts alone fail. (Giffin v. Brooke, 48 O. S., 211; Gardiner v. Gardiner, 65 N. H., 230; 8 L. R. A., 383. Contra, Bigelow v. Gillott, 123 Mass., 102.)

into a fee-simple, will not be operative without re-execution.*

The revocation of a will may be found to have been intended to take effect only upon the due execution of another valid instrument, in its place. And where this is the case, if the later instrument fails, the revocation of the prior will fails also. But it must be evidenced that the testator did not intend to revoke the prior will absolutely with the intention of executing a new will afterwards and that it was to be revoked only upon the execution of the new will, which was supposed to be valid.**

This doctrine known as conditional revocation, or revocation to take effect only upon certain conditions, is summarized by Professor Page as follows: "If the revocation is of a class in which testator's intention to revoke is essential, and testator's intention is in fact conditioned upon a certain state of fact, there is no revocation if such state of fact does not exist" (Wills, Sec. 275).

Where there are both a will and a codicil, the revocation of the will revokes the codicil also if the two instruments are inseparably connected, but not where the

---

*Eschback v. Collins, 61 Md., 478; Miles' App., 68 Conn., 237.

**Eggleston v. Speake, 3 Mod., 259; Burns v. Travis, 117 Ind., 44; Wolf v. Bollinger, 62 Ill., 368; Goods of Cockayne, Deane, Ecc. R., 177; 2 Jur. (N. S.), 454; Stickney v. Hammond, 138 Mass., 116; Carpenter v. Miller, 3 W. Va., 174; Mendinhall's App., 124 Pa. St., 387.

codicil contains independent provisions which may stand alone.

Where a will is found torn, mutilated or defaced, it is competent to show that this was the result of time or accident, or the unlawful act of a third person, and was not done by the testator with the intention of revoking it. Where the will remains in the custody, or within the reach of the testator, until his death, and is then found mutilated or cancelled, the presumption is, that it was done by the testator with the intention of revoking it.* If it had remained in the custody of a third person, and was inaccessible to the testator, the presumption is that it was not done by the testator or by his authority. In every case the presumption is only *prima facie,* and may be rebutted by showing the actual facts and intentions of testator.**

Where a will is shown to have existed, but cannot be found after the testator's death, it will be presumed that he destroyed it with the intention of revoking it, where it remained within his reach and he was of sound mind. But if at the time the will was probably destroyed, the testator was of unsound mind, or if the will was inaccessible to him, the presumption will be, that it was not destroyed as a result of his involuntary act. But in either case these presumptions may

---

*Christmas v. Whinyates, 3 Sw. & Tr., 81; King v. Ponton, 82 Cal., 420; Tomlinson's Est., 133 Pa. St., 245.

**Johnson's Will, 40 Conn., 587; Valentine's Will, 93 Wis., 45.

be rebutted, and the will established if its contents can be shown.*

Sec. 992. SAME SUBJECT — REVOCATION BY LATER INSTRUMENT.—It is a general rule that the latest will or codicil duly executed by the testator controls, and therefore revokes all former wills, by which a different disposition of the property is made.** But a later will, unless it contains express words revoking former wills, has that effect only to the extent that the two are inconsistent; so far as they are not inconsistent the two stand together.***

*Behrens v. Behrens, 47 O. S., 323; Gardiner v. Gardiner, 177 Pa. St., 218; Steinke's Will, 95 Wis., 121; Harris v. Harris, 10 Wash., 555. The declarations of the testator in his life time are admissible both to reaffirm and rebut presumptions of revocation which arise from its disappearance, while the will was in his custody. Valentine's Will, 93 Wis., 45.

**"It is now settled by statute, in most jurisdictions, that if the will is to be revoked by a later instrument, that instrument must be executed with the formalities of a will, and that no matter how clear testator's intention may be, an instrument executed without these forms cannot revoke a will." Page on Wills, Sec. 264, citing Cheese v. Lovejoy, 46 L. J. P., 66; 2 P. D., 251; Barksdale v. Hopkins, 23 Ga., 332; West v. West, 144 Mo., 119; Kennedy v. Upshaw, 64 Tex., 411, and others. So a holographic will, where valid, will revoke a written will. Gordon v. Whitlock, 92 Va., 723; Ennis v. Smith, 14 How., 400, contra, in re Soher, 78 Cal., 477. But a nuncupative will cannot revoke a prior written will unless the State statute authorizes this to be done. Woodward v. Woodward, 5 Sneed (Tenn.), 49.

***Wetmore v. Parker, 52 N. Y., 450; Home v. Noble, 172 U. S., 383; Snowhill v. Snowhill, 3 Zab., 448; Sturgis v. Work, 122 Ind., 134; Austin v. Oakes, 117 N. Y., 577. In the last case cited the second will failed; there being no express revocation clause in it, it was held that the first will was not revoked.

The revoking instrument need not always be a later will or codocil, but may be in the form of a deed, or simply contain the revoking clause and nothing else.*

That is, a will may be revoked by an express writing for that purpose, though the writing is not testamentary in its character, but such revoking instrument must be executed with the same formalities required for a will.**

Where the later will or codicil contains an express revocation clause, revoking all other wills, this clause operates to revoke all previous instruments even though the other provisions of the revoking will prove inoperative.***

But where a will which contains an express revocation clause also contains language which clearly shows that the testator did not mean to revoke the former will, but only to alter or change its provisions, and to have them stand and be effective in their altered form, the previous will may stand and have effect according to such intentions.****

In conflicts between inconsistent wills, courts incline

---

*Paine v. Forsythe, 86 Me., 357; Bayley v. Bayley, 5 Cush., 245; in this last case the revoking instrument was held sufficient when containing this clause duly executed: "It is my wish that the will I made be destroyed and my estate settled according to law."

**Barksdale v. Hopkins, 23 Ga., 332; Noyes' Will, 61 Vt., 14.

***Burns v. Travis, 117 Ind., 44; Walls v. Walls, 182 Pa. S., 226; Pierpont v. Patrick, 53 N. Y., 591.

****Gelbke v. Gelbke, 88 Ala., 427; Watt's Est., 168 Pa. St., 422.

to that construction, in doubtful cases, which will prevent partial intestacy. When two inconsistent wills of the same date, or of no date at all, are found, and nothing can be shown as to their relative order of execution, both must fail; but if one can be shown to be later in fact, it will control.*

But usually the later will, when designed to revoke an earlier will, contains an express clause to that effect, and such a clause will in general operate according to its terms.

A revoking will or codicil, properly executed, when shown to have existed, and that it was not itself revoked, and that its provisions were inconsistent with the former will or that it contained an express revoking clause, will be given effect, even though lost or mislaid, so that it cannot be produced, if proof can be made of its contents.**

Whether the revocation of a later will shall operate to revive an earlier will revoked by it, is a question upon which the authorities are in conflict. In some states and in England the question is settled by statutes

---

*Murphy's Est., 104 Cal., 554; Crossman v. Crossman, 95 N. Y., 145; Gordon v. Whitlock, 92 Va., 723. So where the will is executed in duplicate, both parts operate as one will, and the later one does not revoke the earlier. (Odenuoelder v. Schorr, 8 Mo. App., 458.)

**Wallis v. Wallis, 114 Mass., 510; West v. West, 144 Mo., 119; Lambie's Est., 97 Mich., 49; McIntyre v. McIntyre, 162 U. S., 383; 38 Minn., 169.

which declare, that a will in any manner revoked, shall not be revived, except by a re-execution.*

Where no such statutes exist, a distinction has been made between the revocation of a later will which expressly revokes the earlier one, and one which revokes the earlier one by implication only. As to the former, it is usually held that revocation of the later will does not revive the former one.** As to the second case, many courts reach the same conclusion, though perhaps the weight of authority is that the revocation of the later inconsistent will, leaves the former one in force.*** The reason being that the second instrument revokes the first only by implication and as it would have no force itself until the death of the testator and being recalled before his death, leaves the first will valid.****

There seems to be no conflict that where the revok-

*The Statute 1 Vict., c. 26, Sec. 22; Stickney's Will, 161 N. Y., 42; Wolf v. Bollinger, 62 Ill., 368; Barker v. Bell, 49 Ala., 284. In some States the statutes require merely that it shall appear from the terms of the revocation of the later will that it was the intention of the testator to revive the former. Under such statutes, declarations of the testator are admissible to show his intentions. Williams v. Williams, 142 Mass., 515; McClure v. McClure, 86 Tenn., 173.

**Pickens v. Davis, 134 Mass., 252; Scot v. Fink, 45 Mich., 241; Barksdale v. Hopkins, 23 Ga., 332. Contra, Randall v. Beatty, 31 N. J. Eq., 643; Taylor v. Taylor, 2 Nott. & McC. (S. Car.), 482.

***Peck's App., 50 Conn., 562; 47 Am. Rep., 685; Johnston's Will, 69 Hun. (N. Y.), 157; McClure v. McClure, 86 Tenn., 173. Contra, Hartwell v. Lively, 30 Ga., 315.

****Cheese v. North, 106 Mich., 390; Scott v. Fink, 45 Mich., 241.

ing instrument contains a clause of revocation, and is destroyed by the unauthorized act of another, that the first will is not revived.*

Sec. 993. REVOCATION IMPLIED BY LAW. —Under the rules of the common law a will disposing of real property, was held to be revoked *pro tanto* by a change in testator's estate, and to be revoked entirely where all of his estate had been altered or disposed of.** So, at common law, if the testator made any disposition of his realty whereby his title was divested though but for an instant, it revoked *pro tanto* his previously made will.*** But a will disposing of realty and personalty was not revoked by conveyance of the realty.**** This common law rule was the result of the doctrine that the testator could only devise property which he owned at the time of making the will, his after-acquired realty passed to his heirs at law.*****

But at common law, a change in the testator's estate did not revoke a testament, except to the extent that the testator had made it impossible to satisfy bequests

*Day v. Day, 2 Green Ch. (3 N. J. Eq.), 550.

**Good Title v. Otway, 2 H. Bl., 516; Taylor v. Kelly, 31 Ala., 59; Pleasant's App., 77 Pa. St., 356; Bowen v. Johnson, 6 Ind., 110; Collup v. Smith, 89 Va., 258.

***Cave v. Holford, 3 Ves. Jr., 653.

****Kent v. Mahaffey, 10 O. S., 204. In this case the realty disposed of by the testator was changed into personalty, and was held to pass to his devisee as personalty.

*****Marwood v. Turner, 3 P. Wms., 163; Knolloys v. Alcock, 5 Ves., 648; Walson v. Walton, 7 Johns Ch., 258.

by otherwise disposing of his personalty.* So after-acquired personalty might pass by testament.

Under modern statutes the common law rule as to a change in the estate of testator revoking his will is almost entirely abrogated. The state statutes expressly providing that such changes shall not revoke his will, unless the instrument by which the property is disposed of declares it to be the intention of the testator to have such disposition operate as a revocation of his will in whole or in part.**

---

*Young v. Snow, 168 Mass., 287.

**"A bond, agreement, or covenant, made for a valuable consideration by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall pass by such devise or bequest, subject to the same remedies on such bond, agreement, or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them."—Rev. Stat. of Ohio, Sec. 5954.

"A charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate, previously executed; but the devises and legacies therein contained shall pass and take effect, subject to such charge or incumbrance."—Rev. Stat. of Ohio, Sec. 5955.

"A conveyance, settlement, deed, or other act of the testator, by which his estate or interest in property previously devised or bequeathed by him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property, but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless, in the instrument by which such alteration is made, the intention is declared, that it shall operate as a

At common law, the will of a woman was revoked by her subsequent marriage, unless it had been made with her husband's consent, as part of a marriage settlement. And this common law rule became a part of the common law in the United States, and is expressly sanctioned in a few states by statute, while in other states the statutes expressly declare that the will of an unmarried woman shall not be deemed revoked by her subsequent marriage.*

Where no statute exists upon the subject, it has been held that the modern statutes relieving a married woman of her common law disabilities have abrogated the common law rule.**

---

revocation of such previous devise or bequest."—Rev. Stat. of Ohio, Sec. 5956.

"But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen."—Rev. Stat. of Ohio, Sec. 5957.

*The rule is abrogated in Ohio by Rev. Stat. 5958. In Swan v. Hammond, 138 Mass., 45, where the statute provided the manner in which a will should be revoked, and stated that "nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator," the will of a *feme sole* is held revoked by her subsequent marriage. See also Colcord v. Conroy, 40 Fla., 97; Crum v. Sawyer, 132 Ill., 443; Lansing v. Haynes, 95 Mich., 16; Ellis v. Darden, 86 Ga., 368; 11 L. R. A., 51.

**Noyes v. Southworth, 55 Mich., 173; 54 Am. Rep., 359; Lyon's Will, 96 Wis., 339; Hoitt v. Hoitt, 63 N. H., 475; Tuller's Will, 79 Ill., 99. Contra, Brown v. Clark, 77 N. Y., 369;

At common law, the marriage of a man and the birth of issue revoked his will made before marriage, where such will disposed of all of his property, and made no provision for his issue. And this is the settled rule in the United States.* His marriage alone without the birth of issue did not revoke the will since under the law of descent then prevailing a wife could not inherit from her husband. Under the modern statutes of descent the wife does inherit when the husband dies without issue, and because of this change some courts hold that marriage alone may revoke the will of testator.** Some state statutes uphold this rule, while other decisions deny it.***

Swan v. Hammond, 138 Mass., 45; Shorten v. Judd, 60 Kan., 73.

*Baldwin v. Spriggs, 65 Md., 373; Hoitt v. Hoitt, 63 N. H., 475; Morgan v. Davenport, 60 Tex., 230; Gay v. Gay., 84 Ala., 38; Kenebel v. Scrafton, 2 East., 530. At common law this holding was on the theory that such change of circumstances created a presumption of intention to revoke; the modern basis of the holding is that this condition is annexed to all wills upon the happening of which the will fails.

In Baldwin v. Spriggs, supra, Spriggs was a married man having children living at the time of the execution of his will, these children survived him. He subsequently remarried and had children by his second wife. His will was held to be revoked, although it did not dispose of all of his property, the courts saying that property acquired after the execution of a will, and unaffected by the will is not a provision for the afterborn children.

**American Board v. Nelson, 72 Ill., 564; Sherrer v. Brown, 21 Colo., 481.

***Corker v. Corker, 87 Cal., 643; Hudnall v. Ham, 172 Ill., 76; Swan v. Sayles, 165 Mass., 177; Bowers v. Bowers, 53 Ind., 430; Mundy v. Mundy, 15 O. C. C., 155. State statutes

Changes in the circumstances of the testator might, at common law, raise an inference of revocation, and where the inference was not rebutted amounted to a revocation of a previously made will. These changes which would amount to a revocation, were quite definitely designated at common law, and usually the change is one of these, or one mentioned under modern statutes, or it cannot have the effect of revoking a will, although there are decisions which say that any change in circumstances which creates new moral duties operates as a revocation.* The following changes in the status or circumstances of the testator are held not to be sufficient to constitute a revocation of his previously made will:—a change in the testator's family, as by being divorced from his wife, or the birth of a child contemplated in the will and the death of his wife;** the death of a beneficiary or of a sole lega-

providing that a subsequent marriage revokes the will of the testator, cover cases where after the marriage the husband and wife separate by agreement; and where the will so revoked bequeathed all of testator's property to his intended wife. Corker v. Corker, 87 Cal., 643; Ingersoll v. Hopkins, 170 Mass., 401; Ellis v. Darden, 86 Ga., 368; 11 L. R. A., 51.

*Young's App., 30 Pa. St., 115; Page on Wills, Sec. 285: "The theory underlying the doctrine of revocation by change of circumstances was originally that the testator must be presumed, in view of the change, to have desired a different disposition of his property from that indicated in his will. While this was the theory, the rules of revocation were absolute, and were not changed in cases where it could be shown affirmatively that the testator did not wish or intend the revocation."—Page on Wills, Sec. 280.

**Card v. Alexander, 48 Conn., 492; Warner v. Beach, 4 Gray (70 Mass.), 162.

tee;* testator's re-marriage;** the increase of his estate and his long continued insanity.***

A will impliedly revoked as by marriage, or marriage and birth of issue, is not revived by the dissolution of the marriage or the death of the issue, but in order to be revived must be republished by the testator. What is meant by republication will be taken up in a later section.****

Sec. 994. SAME SUBJECT — EFFECT OF BIRTH OF CHILD UPON PREVIOUS WILL.— As a rule, state statutes provide: 1. That the birth of a child to testator, revokes any will previously made, unless such child is provided for, or intentionally excluded by the provisions of such will.***** 2. That where testator has a child or children at the time of executing his will, but who has a child absent or reported dead, or shall afterwards have a child which is not provided for in such will, such absent or after-born child shall take the same share of the estate, both real and personal, as if the testator had died intestate, unless the

*Brown v. Just, 118 Mich., 678; In re Hickman, 101 Cal., 609; Hoitt v. Hoitt, 63 N. H., 475.

**Charlton v. Miller, 27 O. S., 298.

***Warner v. Beach, 4 Gray, 162.

****See Sec. 997; Ash v. Ash, 9 O. S., 383; Corker v. Corker, 87 Cal., 643; Bowers v. Bowers, 53 Ind., 430.

*****Rev. Stat. of Ohio, Sec. 5959; Belton v. Summer, 31 Fla., 139; Smith v. Robertson, 89 N. Y., 555; Rhodes v. Weldy, 46 O. S., 234. The Ohio Statute provides that "no other evidence to rebut the presumption of revocation shall be received." And a will thus revoked will not be revived by the death of the child in the life time of the testator. Ash v. Ash, 9 O. S., 383.

intention to exclude such child is shown by the terms of the will.* 3. That unless the testator provides for his children, or by language in the will shows his intention to omit to provide for them, such children will take the same share of his estate as they would have taken had he died intestate.**

Sec. 995. SAME SUBJECT—INTENTIONAL OMISSION EXPLAINED.—Where the statutes allow the testator to disinherit a child by intentionally omitting to make provision for such child, it is not necessary for him to use any formal language in expressing such intention. The intention may be inferred from the language used. Thus by the weight of authority where the testator disposes of all of his property ,without naming his children, it is not shown that his intention was to make no provision for them.*** While where the property is all left to the wife of testator, and the will then states that this was done because the testator knows she will always be a kind and devoted mother to his children, the intention not to

*Rev. Stat. of Ohio, Sec. 5961; Grosvenor v. Fogg, 81 Pa. S., 400; Burs v. Allen, 93 Tenn., 149; Bowen v. Hoxie, 130 Mass., 527. These statutes do not revoke the will, but simply provide what the omitted child shall take; so that if the omitted child dies without issue the will is not changed or avoided.

**Trotter v. Trotter, 31 Ark., 145; Lurie v. Radnitzer, 106 Ill., 609; Smith v. Olmstead, 88 Cal., 582.

***Ward v. Ward, 120 Ill., 111; Carpenter v. Snow, 117 Mich., 489; Burch v. Brown, 46 Mo., 441; contra, Lurie v. Radnitzer, 166 Ill., 609.

provide for his children sufficiently appears.* A specific reference to his unborn children by testator, and a provision for them in the alternative, is a sufficient intention to exclude such children except as to such provision.**

So the testator may by express declaration provide that a child, naming him, shall have no part of his estate, and this is unquestionably sufficient (Block v. Block, 3 Mo. 594).

Sec. 996. SAME SUBJECT—WHAT CONSTITUTES A PROVISION FOR A CHILD.—To constitute a provision for a child to satisfy the statutes, the provision must be an interest which will take effect immediately upon the death of the testator, and not a future interest, as a remainder or a reversion, whether vested or contingent.*** Hence where the provision was a devise to testator's wife during her life and at her death to the heirs of her body, it was held not to be sufficient provision for an after-born child.**** Although the decisions are not uniform and there are

---

*Rhodes v. Blevin, 99 Cal., 645; contra, Walker v. Hall., 34 Pa. St., 483.

**Osborn v. Bank, 116 Ill., 130; Verrinder v. Winter, 98 Wis., 287.

***Allen v. Johnson, 63 Ia., 124; Rhodes v. Weldy, 46 O. S., 234; Willard's Est., 68 Pa. St., 237; Ramsdill v. Wentworth, 101 Mass., 125.

****Rhodes v. Weldy, 46 O. S., 234; Bowen v. Hoxie, 137 Mass., 527.

cases which hold that a reversion or a remainder is a sufficient provision under the statutes.*

The fact that the child was in being but not born at the time of the execution of the will does not matter, and such child comes within the rule of after-born children (Evans v. Anderson, 15 O. S. 324). So the birth of an illegitimate child, after the making of a will, where the statutes allow such child to inherit when acknowledged by both parents, and this is done, effects a revocation of the will (Milburn v. Milburn, 60 Ia. 411). But the adoption of a child by testator does not revoke a previously executed will.**

---

*Verrinder v. Winter, 98 Wis., 287.

**Davis v. Fogel, 124 Ind., 41; Comassi's Will, 107 Cal., 1; contra, Woods v. Drake, 135 Mo., 393.

CHAPTER VIII.

REPUBLICATION, JOINT WILLS, CONTRACTS TO WILL, ETC.

Sec. 997. THE REPUBLICATION OF A WILL. —By republication is meant the reissuing and revalidating of a will previously executed. Literally, republication means a second making public, but when applied to wills, it signifies the revival, either by re-execution or by a codicil adapted to the purpose, of a will previously executed, and which may have been revoked.*

After revocation, a will can only be given effect again by a republication. This may be accomplished, either by re-execution with the required formalities, or by the due execution of a codicil or other instrument, recognizing the will as still existing.**

At common law, before the passage of the Statute of Frauds (29 Car. II., Ch. 3, Sec. 5), wills of both real and personal property could be revived or republished by parol evidence of the testator's acts and declarations, or any informal writing of the testator showing an intention to revive, and by keeping the revoked will and speaking about it as his will.*** By the Statute of Frauds, and by statute in the United

*Abbott's Law Dict., "Wills;" Whiting's App., 67 Conn. 379.

**Brown v. Clark, 77 N. Y. 369; Neff's Appeal, 48 Pa. St. 509; Barker v. Bell, 46 Ala., 216.

***Schouler on Wills (2d ed.), Sec. 444; Miller v. Brown, 2 Hagg. 209; Harvard v. Davis, 2 Binn. Pa. 425.

States, the common law rule has been abrogated and wills can only be republished by a formal re-execution or by a properly executed codicil.* The Statute of Frauds applied only to wills of realty and did not affect testaments, while the state statutes in this country usually apply to both wills and testaments.**

The effect of a republication is to make the will thus re-executed of original validity as of the date of such republication.***

The republication also extends the will to subjects which have come into existence since its date, cures all defects in execution, and revokes any prior will which is inconsistent with the instrument republished.****

Sec. 998. JOINT, DUPLICATE AND MUTUAL WILLS CONSIDERED.—"A joint will is, as the name implies, one single instrument made by two or more testators and, if properly executed by each, and intended to take effect upon the death of each, is as much entitled to probate upon the death of each as if each had made a separate will. But a joint will made by two persons to take effect after the death of both

*Long v. Aldred, 3 Add. 48; Barker v. Bell, 46 Ala. 216; Stickney's Will, 161 N. Y. 42.

**Miller v. Brown, 2 Hagg. 209; Jackson v. Holloway, 7 Johns., N. Y. 394.

***Gilmore's Est., 154 Pa. St. 523; Schouler on Wills (2d ed.), Sec. 450; Brown v. Clark, 77 N. Y. 370.

****Am. & Eng. Encyc. of Law, Vol. 29, Pg. 335; Jones v. Shewmaker, 35 Ga. 151; In re Murefield's Will, 74 Ia. 479; Wallpole v. Cholmondeley, 7 Term. Rep. 138. And see previous section 986 on codicils.

will not be admitted to probate during the life of either."*

Two persons may join in a will, by which the survivor shall take the property of the other. So a mutual will of husband and wife is valid, and is held to be the separate will of the one that dies first.**

Two persons owning property in severalty or in common, may unite in one will which may pass the interest of either or both, if either or both die without having revoked it.*** But they cannot fix the death of the survivor as the time for such a will to take effect,

*Am. & Eng. Encyc. of Law (1st ed.), Vol. 29, Pg. 137; Betts v. Harper, 39 O. St. 641; 48 Am. Rep. 77; Wyche v. Clapp, 43 Tex. 544; Matter of Diez's Will, 50 N. Y. 88.

**Matter of Diez's Will, 50 N. Y. 88; Allen v. Allen, 28 Kan. 18; Est. of Mary Cawley, 136 Pa. St. 628. In the last case a brother and sister, Benjamin and Mary Cawley, joined in executing a paper in the following form: "I, B. C. should I die first, and I, M. C., should I be the first to die, give, devise and bequeath, and to the survivor of either of us," all of the estate of the decedent for life with a remainder over. Throughout the paper, except in the clause appointing an executor, the operative words were in the singular number. Benjamin died first, in 1887, and the instrument was probated as his will, and his money was turned over to Mary Cawley. In 1888 Mary Cawley died, and the will was again probated as her will. But soon after a later will of Mary Cawley was produced making a different disposition of her estate from that in the previous paper. It was held that the first instrument was not a contract in form or effect, and there being no joint devise it was not a joint will. It was properly a double will and must be construed and treated as a separate will of each maker. So that at the death of one, it was revocable by the other as to her separate property, and as the later will of Mary Cawley did revoke it, it was not applicable to her estate.

***Walker v. Walker, 14 O. S. 157; Betts v. Harper, 39 O. S. 639; 48 Am. Rep. 477.

as this would delay the settlement of the estate of the one who died first.*

The fact that two persons join in executing a will of property belonging to one of them only does not vitiate it as to that one, and such will is neither a joint nor a mutual will, the additional signature being treated as surplusage. (Smith v. Holden, 58 Kan. 535.)

Where a mutual will is by its terms, to take effect only on a named contingency, it will not operate unless that contingency happens.

The testator may execute two wills, one of which shall operate as to a portion of his estate, and the other as to the residue. He may make two or more wills to take effect in the alternative; and he may execute his will in duplicate, but only one part will be admitted to probate and the revocation of one part with the intention of revoking the will, revokes both parts.

Sec. 999. CONTRACTS TO LEAVE PROPERTY BY WILL CONSIDERED.—Where a testator has made a contract in his life time, upon a valid consideration to dispose of his property in part or in whole, according to the terms of said contract, the question arises to what extent will such contract affect a will not according to the terms of it. Such contract to leave property by will is valid, but there must

*Hershy v. Clark, 35 Ark. 17; 37 Am. Rep. 1; Bank v. Bliss, 67 Conn. 317. But if a mutual will is not offered for probate until the death of all executing it, it may then be admitted as the will of each and all such persons. Walker v. Walker, 14 O. S. 157; Betts v. Harper, 39 O. S. 639.

exist an actual contract, and a mere promise by the testator without consideration will not suffice nor will it be enough that the party claiming has rendered valuable services to the testator, merely upon the hope or expectation that he will obtain compensation through the testator's will. And where there is a contract, the party claiming must show that he has performed his part of the agreement.*

Where the contract is to bequeath personal property, or to give a money legacy, the agreement is valid though not in writing. And if the will is not made as agreed, the party entitled can recover the value of the property or the sum agreed upon from the estate of the deceased, and neither a failure to make any will at all, nor the making of a will leaving all his property to others can defeat the claim.**

Where a contract is to devise real estate, or all of testator's estate both real and personal, such contract must be in writing, to satisfy the Statute of Frauds, in that section which requires agreements for the sale of land to be in writing, or it can not be proved; unless

*Wellington v. Apthorp, 145 Mass. 169; Moore v. Stephens, 97 Ind. 271; Emory v. Darling, 50 O. St. 160; Woods v. Evans, 113 Ill. 186; 86 Ga. 636.

**Wellington v. Apthorp, 145 Mass. 169. A testator's will made in pursuance of such a contract is revocable the same as any other will, the remedy for the breach of a contract is an action for damages against the testator's estate, or a suit in equity to have the beneficiaries made trustees of the property to perform the contract. Sloniger v. Sloniger, 161 Ill. 270; Clark v. Cordry, 69 Mo. App. 6; Hudson v. Hudson, 87 Ga. 678.

there has been such part performance as will take the case out of the Statute of Frauds.*

Where there is a valid contract to leave property by will, and the will is not made as agreed, the party entitled may have compensation out of the estate of the deceased, or he may enforce specific performance of the agreement against the heirs or devisees or against subsequent grantees with notice.**

It is competent for a party to agree with one who would be his heir at law, in case he made no will, that he will make no will, by which the interest of the other as his heir at law, shall be affected. Where such a contract has been entered into upon sufficient consideration, and a will is made disposing of the property, the party entitled may recover from the estate as though there had been no will.***

Where the contract was to compensate the claimant by a legacy not fixed in amount, but left to be determined by the testator, the claimant must be satisfied with whatever legacy is given him in the will. And in any case the claimant by accepting the provision of the will waives the right to further compensation under the contract. If no legacy at all is made, the claimant may

---

*Alexander v. Alexander, 150 Mo. 579; 74 Wis. 176; Manning v. Pippen, 86 Ala. 357; Carmichael v. Carmichael, 72 Mich. 76.

**Jones v. Martin, 5 Ves. Jr. 266; Townsend v. Vanderwerker, 160 U. S. 171; Whiton v. Whiton, 179 Ill. 32; 76 Ill. App. 553; Carmichael v. Carmichael, 72 Mich. 76; Layson v. Davis, 17 Mont. 220; Kastell v. Hilman, 53 N. J. Eq. 49.

***87 Pa. St. 518; 30 Am. Rep. 383.

recover the reasonable value of the consideration rendered by him.*

Sec. 1000. BY WHAT LAW A WILL IS TO BE GOVERNED.—It is the general rule in relation to wills of real property that all questions as to the capacity of the testator, his power to dispose of the property and the formalities of execution, are governed by the law of the place where the land lies; that is, in technical phrase, wills of realty are governed by the *lex rei sitae*.**

This rule means that though the testator executes his will with the formalities required where he is domiciled, but not in accordance with the formalities required in the state where the land lies, it will be invalid.***

The general rule in relation to wills of personal property is, that they are to be governed by the law of the testator's domicile; that is, technically, the *lex domicilii*.****

In some states, the rule as regards realty is changed

*Hudson v. Hudson, 87 Ga. 678; Wallace v. Long, 105 Ind. 522; Porter v. Dunn, 131 N. Y. 314.

**Pepper's Est., 148 Pa. St. 5; Company v. Windsor, 148 Ind. 682; De Vaughn v. Hutchinson, 165 U. S. 566; Bailey v. Bailey, 8 Ohio 239; Am. & Eng. Encyc. of Law, Vol. 3, Pg. 630.

***Knight v. Wheedon, 104 Ga. 309; Nelson v. Potter, N. J. L. 324; Jones v. Robinson, 17 O. S. 171.

****Manuel v. Manuel, 13 O. S. 458; Jenvins v. Company, 53 N. J. Eq. 194; Yore v. Cook, 67 Ill. App. 586.

by statute so far as the formalities of execution are concerned, by making the law of the place where the will is executed control.

Under these statutes a will valid where executed is made sufficient to pass title to land anywhere.*

*Green v. Alden, 92 Me. 177.

CHAPTER IX.

PROBATE AND CONTEST OF WILLS.

Sec. 1001. WHAT IS MEANT BY PROBATE. —Probate is defined "as the solemn judicial act of an officer authorized by law adjudging and decreeing that the instrument offered to be proved or recorded as the last will and testament of deceased is such last will and testament. The word 'probate' is often so used as to include the offering of proof before such authorized officer, and even the entire judicial proceeding which results in the admission of the will to probate."*

Under modern law the will is of no effect until it has been probated, that is, proved and allowed as required by law by the appropriate tribunal provided for the purpose. At the common law, a will of realty was not probated, and was in itself sufficient to transfer title, and in cases of dispute it was subject of proof in ejectment or partition the same as a deed.**

---

*Page on Wills, Sec. 312; Knox v. Paull, 95 Ala. 505; Wall v. Wall, 123 Pa. St. 545; Myers v. Smith, 50 Kan. 1.

Probate. "Legal proof. The proceeding by which a will is proved to be that of the testator and legally declared and executed. The decree determining that a will is legal and proved. A certified copy of such. A will delivered to the executor. The jurisdiction to prove wills." English's Law Dictionary.

**Floyd v. Herring, 64 N. Car. 409; Knox v. Paull, 95 Ala. 505; Luther v. Luther, 122 Ill. 558; Woodbridge v. Banning, 14 O. S. 328.

Sec. 1002. THE METHOD FOLLOWED IN PROBATING WILLS.—The methods or modes of proving testaments at the common law were either the solemn form, which was done by citing all the persons interested to appear and the examination of the witnesses by the court and those who might dispute the validity of the will; or the common form, which was done *ex parte* by the mere presentation of the instrument by the executor upon his own oath before the probating tribunal. In the latter case the proof was not final and any interested party could by application have a re-propounding and formal proof, while in the former case the probate could only be attacked for fraud or collusion.*

In the United States there is no distinction between wills of realty or personalty in regard to probate, and the manner of probating the instrument is fixed by statute, which in the first instance is, generally, the common form, modified as regards notice to adverse parties and their rights to be present and examine witnesses offered in proof of the will, and in the second instance, the further right of any party interested to

*"English probate is obtained by the executor, and is either in common form, which is only upon the executor's own oath before the ordinary or his surrogate, or *per testes*, in more solemn form of law in case the validity of the will be disputed. When the will is so proved, the original must be deposited in the registry of the court; and a copy thereof on parchment is made out under its seal, and delivered to the executors, together with a certificate of its having been proved—all which together is usually styled the probate." 2 Steph. Com. 202; Hubbard v. Hubbard, 7 Oreg. 42; Mears v. Mears, 15 O. S. 90.

contest such proven or probated will in another proceeding, either in the same court or in another court by the statutory process of a suit which is in the nature of an appeal, though an independent action.*

Sec. 1003. THE COURTS HAVING PROBATE JURISDICTION.—In nearly all of the United States the probating of wills is committed to some special court, established for that purpose, and variously styled, probate courts, orphan's courts, and surrogate courts. Though in some states no special court is provided.

These courts while usually courts of record, are yet of limited jurisdiction, but within their jurisdiction they are usually given exclusive power, and their action is as a rule conclusive until set aside by an appellate court, under the mode provided by statute.** Their probate proceedings are not usually to be reviewed by the common law process of *certiorari,* or writ of error, but by a distinct action provided by statute which is said to be in the nature of an appeal.***

Where probate tribunals are established, the chancery or equity courts have no implied jurisdiction over the probating of wills; nor can they decree the probate of a will as incidental to other equitable relief.**** Al-

*Haynes v. Haynes, 33 O. S. 598; Corly v. Probate Judge, 96 Mich. 11; Clark v. Ellis, 9 Or. 128; Larson's Est., 71 Minn. 250.

**Israel v. Wolf, 100 Ga. 339; Oakley v. Taylor, 64 Fed. Rep. 245.

***Bradford v. Andrews, 20 O. S. 208; Rothrock v. Rothrock, 22 Or. 551.

****McDaniel v. Pattison, 98 Cal. 86; Wells, Fargo & Co. v. Walsh, 87 Wis. 67.

though an injunction has been allowed to issue to restrain the probating of a second will which would revoke a former will made in pursuance of a valid contract.*

Probate tribunals are limited as a rule to such persons as reside within their territorial jurisdiction, or to property situated therein. And their territorial jurisdiction may be limited to the county in which the testator was a resident.**

Sec. 1004. NATURE OF PROBATE PROCEEDINGS.—The proceedings of tribunals in matters of probate are largely in the nature of proceedings *in rem,* that is, against a thing, as the property of the testator, and they consider persons only so far as necessary to give them an opportunity to assert their rights in the property in question. The fact that the order of probate is regarded as a proceeding *in rem,* is of importance as regards notice to interested parties, and in preventing collateral attack for want of actual notice. Thus since the action is against the property of the testator it is supposed to be the best kind of notice to all persons interested in such property, and notice by publication to interested parties is sufficient in probate matters. So that unless the statutes require a particular form of notice to interested parties, the fact

*Cobb v. Hanford, 88 Hun. (N. Y.) 21.

**Converse v. Starr, 23 O. S. 491; Frame v. Thormann, 102 Wis. 653; Gordon's Will, 50 N. J. Eq. 397. So the court may, upon due notice, admit a will to probate in any part of the county. Lagrange v. Ward, 11 Ohio 257.

that the proceeding is one *in rem* is binding on all the world though no actual notice was received, and the order admitting to probate cannot be collaterally attacked for want of notice.*

A judgment, order, or decree admitting or rejecting a will made by a probate tribunal, while it remains unreversed is conclusive upon all the world, except interested persons not parties to the suit, or who are not considered parties to the suit by the rules of procedure and the nature of the proceeding,—as to the execution and validity or invalidity of such will. If the will is admitted to probate it settles the questions of mental capacity, undue influence, fraud, and the like, and prevents all such questions from being raised collaterally, or otherwise than by a direct attack by appeal or in a contest.**

Sec. 1005. WHAT INSTRUMENTS SHOULD BE PROBATED, AND WHEN?—All instruments of a testamentary character should be probated, and this is true though the instrument to be probated is valid in part, and invalid in part.***

In the absence of statutory limitations a will may be admitted to probate at any time after the death of the testator. But acts done, and rights acquired under a

*Brigham v. Fayerweather, 140 Mass. 411; McCambridge v. Walraven, 88 Md. 378; Medlock v. Merritt, 102 Ga. 212.

**Smith v. Holden, 58 Kan, 535; Sly v. Hunt, 159 Mass. 151; Wilkins v. Hukill, 115 Mich. 594; Harp v. Parr, 168 Ill. 459; McClure v. Spivey, 123 Car. 678.

***McClary v. Stull, 44 Neb. 175; In re Gilbert's Est., 78 Law T. Rep. 762.

previous grant of administration will be protected.* In some states by statute a beneficiary forfeits his rights under a will by delaying to probate it within a specified time from the death of testator.** The probate court has power also to enforce the production of a will for probate when it is known to exist.

Sec. 1006. WHO MAY OFFER A WILL FOR PROBATE?—Any person interested in the estate of the testator, as a beneficiary, creditor, and the like, may propound a will for probate. It is usually provided by statute that it shall be the duty of the executor, or any person having the will in his posession to produce it for probate.*** The application for probate should show that it is made by a party having a beneficial interest under the will.****

Sec. 1007. THE FORMALITIES NECESSARY IN PROBATING A WILL.—A will is usually propounded by some party in interest filing a written application in the probate tribunal, setting forth the death of the testator, the names and residences of the heirs and next of kin of the deceased, with the will of the deceased, and the facts showing the jurisdiction of the court, and praying that such will may be proved and

*Keith v. Proctor, 114 Ala. 676; 146 Mass. 155; 114; Ill. 342; 55 Am. Rep. 869; Vance v. Upson, 64 Tex. 266. See Allen v. Froman, 96 Ky. 313.

**Carpenter v. Denoon, 29 O. S. 379; Foote v. Foote, 61 Mich. 181.

***Mower v. Verplanke, 105 Mich. 398; Lasak's Will, 131 N. Y. 624; Wells, Fargo Co. v. Walsh, 87 Wis. 67.

****Doane v. Mercantile Co., 160 N. Y. 494.

recorded upon a day to be set by the court.* A written application for probate is perhaps not imperative unless required by statute.**

Upon the filing of the application for probate a day is fixed for the hearing, and notice of that fact is required to be given to all persons interested in the estate, either by notifying them personally, or by publication in a newspaper of the time and place of the hearing, or both. The special statute governing the form of notice must be followed in each case, and unless it is followed the persons not notified will not be bound by the proceeding.*** The party not notified is perhaps the only one who can take advantage of it.****

As we have seen, at common law there were two forms of probate, the common form and the solemn form, and in most states the common form prevails, and the solemn form is provided for in a separate proceeding on appeal or by contest.

When there is no contest the will is ordinarily admitted to probate on the testimony of one subscribing witness only, without calling the other. In such cases *prima facie* evidence of capacity and due execution will suffice. But even in case of contest, the testimony of one witness will be enough if he can show due execu-

---

*See form of application on page 277 of this book.

**In re Storey, 120 Ill. 244; Deslonde v. Darrington, 29 Ala. 92; Malone v. Cornelius, 34 Or. 192.

***Larson's Est., 71 Minn. 250; Curtis v. Underwood, 101 Cal. 661; Herring v. Ricketts, 101 Ala. 340; Hamilton's Est., 120 Cal. 421.

****Reese v. Nolan, 99 Ala. 203.

tion. Where the common form of probate is modeled on the common law or ecclesiastical procedure, no notice to the parties is necessary, the probate being *ex parte.**

Where the probate is *ex parte,* the parties opposing the will may not testify, but may cross-examine the witnesses offered to prove the will.**

Where the subscribing witnesses are beyond the jurisdiction of the probate tribunal, a commission is issued with the will annexed to the place where they reside to take their depositions. The statutes sometimes require that the testimony of the witnesses shall be reduced to writing and signed by them, and this is held to mean by some courts that their testimony must be offered by way of affidavits.*** Other courts hold that the setting out of the substance of the testimony in the record will satisfy this provision.****

Where the subscribing witnesses to the will are beyond reach of process, or are dead, or incompetent, or refuse to testify, the testator's capacity, and the due execution of the will may be proved by other witnesses.

---

*Thus in Malone v. Cornelius, 34 Or. 192, it is said that "the probate of a will (under the Oregon statute) is wholly an *ex parte* proceeding. It is made by the presentation of the will to the proper county court, together with a verified petition for its admission to probate, setting forth the facts necessary to give the court jurisdiction, and the production of competent evidence of its validity."

**Gray v. Gray, 60 N. H. 28; M. E. Missionary Soc. v. Ely, 56 O. S. 405; Malone v. Cornelius, 34 Or. 192.

***Baker v. Cravens, 150 Ind. 199.

****Reese v. Nolan, 99 Ala. 203.

For the purpose of proving execution in such cases, evidence of the handwriting of the witnesses and the testator is admissible.*

The will may be established against the testimony of the subscribing witnesses, but to do so the proof must be clear. The fact that all of the witnesses do not remember all that occurred, or that they do not agree in their testimony, will not defeat the probate, if from all of the testimony, due execution and the testator's capacity appear.**

Sec. 1008. THE FORMALITIES NECESSARY IN CONTESTING A WILL.—While as a rule formal issues and pleadings are not required in a suit to contest the validity of a will which has been probated, yet some pleading on the part of the contestant is essential to show the grounds of the contest, and this depends upon the form of procedure in vogue where the contest is had. The pleading may be in the form of a petition, and as the question is the validity or invalidity of the will, it is usually not necessary to separately state the various grounds of attack.***

But the state statutes may require the grounds of attack to be separately and specifically stated, and

*McTaggart v. Thompson, 14 Pa. St. 149; Higinbotham v. Higinbotham, 106 Ala. 314; Crandall's Appeal, 63 Conn. 365.

**Robinson v. Brewster, 140 Ill. 649; Mays v. Mays, 114 Mo. 536; Whitelaw v. Sims, 90 Va. 588; Berg's Est., 173 Pa. St. 647.

***See form of Petition for Contest on page — of this book; Fraser v. Jennison, 106 U. S. 191; Sinnett v. Bowman, 151 Ill. 146; Dew v. Reid, 52 O. S. 519.

where this is the case evidence cannot be admitted on issues not stated.*

The statutes provide that any person interested in the estate of the testator adversely to the will, or any person aggrieved by the dispositions in the will, may contest the same, but the whole question must be disposed of in one proceeding, and the court may order the joining of separate actions. A person may contest a will in which he is a beneficiary, where he would take more if it were denied probate.**

A person not interested or benefitted by the rejection of the will, as by taking part of the estate or obtaining the right to administer cannot attack the probate of the will. (Jele v. Lemberger, 163 Ill. 338; Lockhart v. Stephenson, 120 Ala. 641.) So the right to contest is so far personal, as not to survive where the person who might contest dies before suit is brought. (Stoors v. St. Luke's Hospital, 180 Ill. 368.)

One who has a right to contest the will, may by a valid contract not to contest estop himself from doing so; so the acceptance and retention with full knowledge of the facts which would authorize a contest, of a legacy under the will, estops such legatee from contesting the will.***

*Wending v. Teeple, 144 Ind. 189; Barksdale v. Davis, 114 Ala. 623; Livingstone's Appeal, 63 Conn. 68.

**Shepard's Est., 170 Pa. St. 323; Lockard v. Stevenson, 120 Ala. 641; Murry v. Hennessy, 48 Neb. 608; Kostelecky v. Scherhardt, 99 Ia. 120.

***Garcelon's Est., 104 Cal. 570; Gore v. Howard, 64 Tenn. 577; Madison v. Larmon, 170 Ill. 65; Bartlett v. Manor, 146

The executor under the will is the proper party to defend the will, and where there is no executor, an administrator with the will annexed may be appointed to defend the contest. (Crocker v. Balch, 55 S. W. Rep. 307. Tenn. 1900.) The beneficiaries under the will are necessary parties defendant, and this includes the husband of a legatee, and the grantee of real estate from a devisee under the will.*

A suit to contest a will admitted to probate must by statute be brought within a stated time, varying in the different states from one to five years after probate. It is the special statute fixing the limitation which governs, and after such time has expired the court has no jurisdiction to entertain a contest though the parties consent.** In some cases it is held that where the grounds of contest are fraudulently concealed from an heir until the limitation for the contest has expired yet he may not contest.*** While other cases hold that for fraud or mistake the probate of a will may be set aside without regard to the time limitation.****

The statutes fixing the time within which contest

Ind. 621. Contra, Bates v. Smith, 3 Cin. L. B. 344 (Ohio). In this case the legacy under the will was less than it would otherwise have been.

*Moore v. Gubbins, 54 Ill. App. 163; Burnett v. Milnes, 148 Ind. 230; Roberts v. Abbott, 127 Ind. 83.

**Meyer v. Henderson, 88 Md. 585; Sbarboro's Est., 63 Cal. 5; Nichol's Estate, 174 Pa. St. 405.

***Stowe v. Stowe, 140 Mo. 594; Luther v. Luther, 122 Ill. 558.

****Vance v. Upson, 64 Tex. 266; Snuffer v. Howerton, 124 Mo. 637. This rule is statutory.

must be begun, except persons who are out of the state, of unsound mind, infants and the like, who are given a stated time after the disabilities are removed to start the contest. These disabilities cannot be added together in order to enlarge the time within which the suit must be brought, as by adding years of absence from the state to the period of minority.*

As regards notice in contest suits, some states require that all parties interested must be made parties, plaintiff or defendant, and given actual notice or constructive notice, as by publication.** In other states, where the contest, like the probate is regarded as a proceeding *in rem,* and all parties are supposed to have notice in regard to the winding up of the estate, it is not necessary to give notice to the interested parties. Where the statutes prescribe the notice to be given, such notice is sufficient.***

Sec. 1009. MODE OF PROCEDURE AT TRIAL OF CONTEST.—Though the presumption is in favor of the sanity of the testator, the proponents have the burden of proof as to the validity of the will, and are required under most statutes to make a *prima facie* showing of capacity and validity, having done this, it is then incumbent on the part of the contestants to offer

---

*Powell v. Koehler, 52 O. S. 103; See Rev. Stat. of Ohio, Secs. 5866 and 5933.

**Reformed Church v. Nelson, 35 O. S. 638; McDonald v. McDonald, 142 Ind. 55; Moore v. Gubbins, 54 Ill. App. 163.

***Brigham v. Fayerweather, 140 Mass. 411; Miller's Est., 166 Pa. St. 97.

their evidence attacking the will, after which the proponents may offer rebutting testimony. The proponent thus having the burden of establishing the validity of the will, has also the right to open and close the argument.* The method of procedure is largely statutory and varies in the different states according to the terms of the statutes.**

Unless the statutes provide for a jury trial, or the probate court has the power to direct the issue of fact as to the validity or invalidity of the will to be tried by jury, a jury is not demandable as a constitutional right.*** In most jurisdictions a jury trial is provided for in one way or another.****

The mode of proof in contest cases, must be in accordance with the rule prevailing where and when the will is presented for probate. But the fact that the law requires the will to be attested by a certain number of witnesses does not require the same number to prove it.

Where the question raised at the contest is the incapacity of the testator to make the will in question, it is the capacity of the testator at the time of executing the will that is the point in issue. (Robinson v. Adams,

*Banning v. Banning, 12 O. S. 437; Bardell v. Brady, 172 Ill. 420; Sheehan v. Kearney (Miss.), 35 L. R. A. 102; Mears v. Mears, 15 O. S. 90.

**Slingloff v. Brimer, 174 Ill. 561.

***Page on Wills, Sec. 331; Cummins v. Cummins, 1 Marv. (Del.) 423; 31 Atl. 816; Loeser's Will, 167 Pa. St. 498.

****Robinson's Est., 106 Cal. 493; Camp v. Shaw, 52 Ill. App. 241; Medill v. Snyder, 61 Kan. 15.

62 Me. 369.) By the weight of authority the burden of proof in this issue is upon the party alleging the incapacity of testator, since there is a general presumption of sanity.* Upon the question of testator's capacity the opinions of expert witnesses may be received without giving the facts upon which such opinions are based.** In most states the opinions of witnesses, not experts, will not be received in such cases unless they were also the subscribing witnessess to the will, or first qualify by showing that their opinion is based upon facts as to testator's condition within their personal knowledge.*** While in Massachusetts a witness who is neither a subscribing witness, nor an expert, cannot give his opinion as to testator's capacity, and this is so

*Blough v. Parry, 144 Ind. 463; Sturdevant's Appeal, 71 Conn. 392; Barnewall v. Murrell, 108 Ala. 366; Carl v. Gabel, 120 Mo. 283; Barnes v. Barnes, 66 Me. 286. Contra, Evans v. Arnold, 52 Ga. 169; Moriarity v. Moriarity, 108 Mich. 249; Chrisman v. Chrisman, 16 Ore. 127.

**Toomes' Estate, 54 Cal. 509; General Convention, Etc., v. Crockett, 7 Ohio C. C. 327; Crocker v. Davis, 81 Md. 134. By an expert is here meant, one who is familiar with the facts and symptoms of mental disease by reason of study and experience, as a physician who has studied such diseases and made a specialty in treating them. And a physician in general practice is held to be an expert in such cases. Barber's Appeal, 63 Conn. 393; Pidcock v. Potter, 68 Pa. St. 342. The expert gives his opinion either from his acquaintance with the testator, or from hypothetical questions based upon the facts in the case.

***Lamb v. Lippincott, 115 Mich. 611; Elcessor v. Elcessor, 146 Pa. St. 359; Burney v. Torrey, 100 Ala. 157; Hardy v. Merrell, 56 N. H. 227; 22 Am. Rep. 441.

regardless of his knowledge of facts or intimate acquaintance with testator.*

Subscribing witnesses to a will may always give their opinion as to the sanity or insanity of testator without giving the facts upon which they base their opinions. The mere fact that they were chosen as subscribing witnesses by the testator qualifies them in this regard.** Their testimony as to capacity is not in law of any higher value than that of other witnesses, and where their testimony is against the competency of the testator it may be of less weight than that of other witnesses, since it is in effect contrary to their action as subscribing witnesses to the will.***

When the opinion of the witness is desired as to the sanity of the testator, the question may be in the form: "In your judgment was testator competent to make a will?" This question is objectionable as it takes for granted that the witness knows the degree of capacity required to make a valid will. A better form is: "Was the testator, in your opinion, capable of planning and executing such a paper as is here offered as his will?" or, "What would you say as to whether at that time her mind was clear?"****

---

*Smith v. Smith, 157 Mass. 389; Hastings v. Rider, 99 Mass. 622.

**Williams v. Spencer, 150 Mass. 346; Robinson v. Adams, 62 Me. 369; Hastings v. Rider, 99 Mass. 622.

***Chappell v. Trent, 90 Va. 849; Stevens v. Leonard (Ind.), 56 N. E. Rep. 27.

****Page on Wills, Sec. 392; citing, Kempsey v. McGinniss, 21 Mich. 123; McHugh v. Fitzgerald, 103 Mich. 21.

Where the issue at contest, is, the presence of undue influence at the time of the making of the will, the burden of proof is upon the contestant, or party alleging it.* Though when suspicious circumstances exist at the time of making the will the burden is said to shift to the supporters of the will.** Because of the secrecy and underhand methods of those exercising undue influence the courts allow the admission of circumstantial evidence and a wide range of inquiry to prove the issue.*** And upon final decision the will may fail in part, and stand as to the residue. While in the case of incapacity, if the will fails, it fails as a whole. So the questions of mental capacity and undue influence are distinct issues to the extent that the will may fail on either ground where both are alleged and only one proven.****

The form of the verdict in contest cases, while determined by statute, is usually for or against the validity of the will in dispute, but it is also required to be in the form of a special finding in some states.***** When the will is finally admitted to probate, either in common form, or upon contest, it is conclusive upon all the

*Maddox v. Maddox, 114 Mo. 35; Yorke's Estate, 185 Pa. St. 61; Post v. Mason, 91 N. Y. 539; Carpenter v. Hatch, 64 N. H. 573.

**Miller v. Miller, 187 Pa. St. 572; Claffey v. Ledwith, 56 N. J. Eq. 333; McFadin v. Catron, 120 Mo. 252.

***Hess's Will, 48 Minn. 504; Caven v. Agnew, 186 Pa. St. 314.

****Fenton's Will, 97 Ia. 192.

*****In re Langan, 74 Cal. 353; Gordon v. Burris, 141 Mo. 602; Baker v. Cravens, 150 Ind. 199.

world, and is not to be questioned either in the home state or in sister states.* It is to be understood that the common form of probate may of course be appealed from or attacked in the method provided for by statute; but all questions settled by the probate cannot be raised collaterally; neither can a court of equity set aside the probate of a will on the ground that it was procured by fraud, or that the will was forged.

Where an order of probate has been made on the erroneous assumption that the testator is dead, it may be set aside as a nullity.** So where after the probate of one will, a later will or codicil is found, the later instrument may be admitted to probate.

The parties interested as proponents and contestants of a will may enter into an agreement, upon a full and fair understanding of the facts, not to contest the will and to distribute the estate according to the terms of their agreements, and such agreements are usually held valid.***

Sec. 1010. PROBATE AND CONTEST OF LOST AND SPOLIATED WILLS.—Where a will duly executed and not revoked is lost, or totally spoliated by some one other than the testator and without the

*Martin v. Stovall (Tenn.), 52 S. W. Rep. 296.

**Day v. Floyd, 130 Mass. 488; Devlin v. Commonwealth, 101 Pa. St. 273. Contra, Roderigas v. East End Sav. Inst., 63 N. Y. 460, overruled in 76 N. Y. 316, and Scott v. McNeal, 154 U. S. 34.

***Waller v. Marks, 100 Ky. 541; Gore v. Howard, 94 Tenn. 577; Garcelon's Estate, 104 Cal. 570; Stringfellow v. Early, 15 Tex. Civ. App. 597.

consent of testator, or is mislaid or destroyed, either in the life time of the testator or after his death, it may be admitted to probate if satisfactory proof can be given of its having been so lost, destroyed or spoliated, and of its contents, and that it was not revoked by the testator. The evidence of these facts must be clear and satisfactory, though the evidence of one witness is sufficient to prove the contents of such a will, unless the statutes require two witnesses.*

It is held in some cases that the will can be so established only where proof can be given of its entire contents, but the true rule seems to be, that if only a part is proved, the part so proved, will be given effect. Even where the missing will revoked a former will, which was produced, such lost will may be given its revoking effect if established.** In some states the courts only permit the establishing of such a will when it can be proven to have existed unrevoked and in proper form after the death or insanity of the testator.*** In any case the subject is largely controlled by state statutes, and a petitioner for the probate of a lost will must bring himself within the provisions of such statutes.****

The statutes indicate the tribunal for the establish-

*Steinke's Will, 95 Wis. 121; Sullivan v. Sullivan, 114 Mich. 189; Jones v. Caster, 139 Ind. 382; Sinclair's Will, 5 O. S. 290.

**118 Ill. 576; 59 Am. Rep. 395.

***Jones v. Casler, 139 Ind. 382; Sinclair's Will, 5 O. S. 290; Kidder's Estate, 57 Cal. 282.

****Jones v. Casler, 139 Ind. 382.

ing of lost wills, which is usually the ordinary probate tribunal, and the provisions as to parties, notice, and the like are usually the same as in other cases. The suit should be commenced by petition setting forth the facts relied on as to the execution of the will, and the fact that it is lost, and such other facts as are necessary to bring the pleader within the special statute. In case of a contest, which may be had as in other cases, the jury take into consideration not only the provisions of the lost will as probated, but may determine what the provisions of the lost will actually were.*

Sec. 1011. THE PROBATE OF FOREIGN WILLS.—By a foreign will, is meant one made by a testator domiciled in a foreign state or country, and which at the death of testator has been admitted to probate in such foreign country, but to pass title to property is offered for probate in a state other than the one in which testator was domiciled. Provision is usually made by special statute for allowing a foreign will to be probated, upon satisfactory proof that it has been proved and allowed by the proper court in the foreign state or country.**

Some distinctions are made in practice, between a foreign will from a sister state, and one from a country other than the United States. (Carpenter v. Denoon, 29 O. S. 379.)

*Haynes v. Haynes, 33 O. S. 598; Behrens v. Behrens, 47 O. S. 323.

**Mower v. Verplanke, 101 Mich. 209; Calloway v. Cooley, 50 Kan. 743.

Any person having a legal interest under a foreign will may make application for its probating. Notice may be given by publication, and on the hearing a certified copy of the will and the order of the foreign court admitting it to probate should be offered in evidence.*

The effect of the probate of a foreign will is to vest the title to the property of the testator within the jurisdiction in the beneficiaries as of the date of the testator's death, so that a previous sale of the property by the beneficiaries would be validated by a subsequent probating of the will. (Babcock v. Collins, 60 Minn. 73; 61 N. W. Rep. 1020.)

In some states the statutes provide that a foreign will affecting the title to real estate in that state may be registered or recorded in the county where the land lies, and unless this is done the title to the realty does not pass to the beneficiaries.**

Sec. 1012. THE PROBATE OF CONTINGENT WILLS.—If the will to be probated be a contingent or conditional one, proof of the happening of the event or condition necessary to give it effect must also be made at probate.

Sec. 1013. AFTER PROBATE THE WILL IS CARRIED INTO EFFECT BY THE EXECUTOR. —When the will has been properly established by pro-

*Mower v. Verplanke, 101 Mich. 209; Clow v. Plummer, 85 Mich. 550.

**Wells, Fargo & Co. v. Walsh, 87 Wis. 67.

bate, or on contest, its execution is committed to the executor therein named, or if none be named, or the one named will not accept, its execution is then committed by the court, to a suitable person, who is styled an "administrator with the will annexed."

When the steps already enumerated have been taken, the only questions which arise are those concerning the meaning of the terms and provisions in the will, as employed by the testator, and these are discussed in the following pages under the head of "Construction."

CHAPTER X.

CONSTRUCTION AND EFFECT OF WILLS

Sec. 1014. WHAT IS MEANT BY CONSTRUCTION AND EFFECT.—A will having been made and proved and allowed, it next becomes necessary to ascertain its legal effect. Which is done by construing its various terms and the language employed by the testator. Questions of the construction and the effect of the will are distinct from questions of capacity and execution. That is, when the will comes to be construed it is presupposed that all of the formalities prescribed by law, and the necessary requirements for the execution of a valid will have been complied with. Questions of construction and effect are not usually raised at the probate of a will, but usually arise in an independent action brought by some one whose interests are affected by the will.

Construction is defined as "the ascertaining and determining of testator's intention as expressed in his will, and its application to existing facts and circumstances with which such intention deals."*

In order to ascertain the effect of a will, the meaning of the language used by the testator must first be determined, and this leads to the necessity of definition, interpretation, and construction. While these three terms are distinct in a sense and commonly distinguish-

*Page on Wills, Sec. 457.

able in meaning, yet in the law of wills and in judicial decisions the word "construction" is usually employed in a sense broad enough to include both definition and interpretation.*

In searching for the effect to be given the will the courts may have recourse, first, to rules of construction; second, to presumptions; and, third, to rules of law. Each of these differs from the others, and may be roughly explained as follows:—

Rules of construction are applied to aid in determining which of two possible meanings shall be given to the language used, and when the conclusion is reached, it ordinarily cannot be varied by parol evidence.

Presumptions are conclusions of fact, at which the law arises in the absence of evidence to the contrary. They may ordinarily be rebutted by extrinsic evidence.

Rules of law, are fixed principles which absolutely control the meaning to be given to certain provisions, and they cannot be varied or avoided by any efforts.

Sec. 1015. I.—RULES OF CONSTRUCTION.—A rule of construction, it has been said, may always be reduced to the following form: certain words or expressions, which may mean either x or y, shall *prima*

*Page on Wills, Sec. 458. Dr. Lieber, a celebrated German writer, distinguishes interpretation from construction, by defining the first as the determining "of the true sense of the special form of words used;" and construction as "the drawing of conclusions respecting subjects which lie beyond the direct expression of the text,—conclusions which are in the spirit, though not within the letter of the text."—Leg. & Pol. Hermenutics.

facie be taken to mean x. This rule of construction is always to be applied subject to this proviso, namely:—that it shall apply unless a contrary intention appear by the will.

It is always to be remembered that it is the intention of the testator that the construing court is endeavoring to ascertain, and while this intention must be gleaned from the words and expressions used by the testator with such extrinsic evidence as may be admissible, when it is discovered it must prevail, unless contrary to some positive rule of law.*

The rule that it is the testator's intention which is to be given effect, is so general and undisputed, that where the intention of the testator is clear, every rule of construction must yield to such intent.**

Rules of construction may be divided into two classes: (A) General principles of construction. (B) Special rules of construction.

Sec. 1016. SAME SUBJECT—(A) OF GENERAL PRINCIPLES.—The general and usual principles of construction, which are customarily followed by the courts are as follows:—

1. The plain intention of the testator, as evidenced by language of his employed in the will, must prevail

*Sturgis v. Work, 122 Ind. 134; Finlay v. King, 3 Pet. (U. S.) 346; Phayer v. Kennedy, 169 Ill. 360; Stevenson v. Evans, 10 O. S. 307; Whitcomb v. Rodman, 156 Ill. 116.

**Brasher v. Marsh, 15 O. S. 103; Still v. Spear, 45 Pa. St. 168; Cox v. Handy, 78 Md. 108; Wentworth v. Fernald, 92 Me. 282.

if that intention can be carried into effect without violating the principles of the law.*

2. The intention of testator is to be gathered from the whole will, including codicils if any, and not from detached portions of the will.**

3. Such a construction is to be adopted, if possible, as shall give effect to all parts of the will, and which shall make each word and clause mean something.***

4. The will is to be construed, if possible, so as to avoid partial intestacy.****

5. The language used, shall so far as may be, be taken in connection with testator's situation, and surroundings.

6. Technical terms are not necessary to a valid will, but where used, will *prima facie* be taken to have been used in their correct technical sense, unless from what precedes their use it is clear that the testator used them

---

*Townsend v. Townsend, 25 O. S. 477; Hadley v. Hadley, 100 Tenn. 446; Thurber v. Batty, 105 Mich. 718; Colton v. Colton, 127 U. S. 309. Of the numerous authorities upholding this rule Professor Page cites over sixty.—Page on Wills, Sec. 461.

**Roe v. Vingut, 117 N. Y. 204; Young v. Harkleroad, 166 Ill. 318; Sturgis v. Work, 122 Ind. 134; Carter v. Reddish, 32 O. S. 1; Richardson v. Willis, 163 Mass. 130; Negley v. Gard, 20 Ohio 310.

***Pinney v. Newton, 66 Conn. 141; Crozier v. Bray, 120 N. Y. 366; Huffman v. Young, 170 Ill. 290.

****Lett v. Randall, 10 Sim. 112; Davis v. Corwine, 25 O. S. 668; Cox's Est., 180 Pa. St. 139; Whitcomb v. Rodman, 156 Ill. 116. In the last case the court said: "It will be presumed that a person when he makes and publishes a will intends to dispose of his whole estate, unless the presumption is rebutted by its provisions or evidence to the contrary."

in another sense. But the mere fact that the testator was uneducated will not overthrow the presumption that words were correctly used, to do so it must appear from the will itself that a different meaning was intended.*

7. Words, whether technical or popular, are prima facie to be taken, as used in their plain and usual sense, unless from the face of the will it appears that they were otherwise used,** and words occurring more than once in the will, shall *prima facie* be taken as used always in the same sense.***

8. Words of general description will not, ordinarily, be limited by subsequent attempts at more particular descriptions. Thus "all personal property," bequeaths everything of that character which the testator has, although a later clause attempts to describe particularly such property and is not a full description.**** And when the general intent of the will, and the particular intent conflict, the general intent will usually prevail.*****

9. When general words, such as "goods and chat-

*Townsend v. Townsend, 25 O. S. 477; Wallace v. Minor, 86 Va. 550; Ihrien's Est., 162 Pa. St. 369.

**2 Bl. Com. 379; Taubenhau v. Dunz, 125 Ill. 424; Carter v. Reddish, 32 O. S. 1; Wolffe v. Loeb, 98 Ala. 426.

***Allen's App., 69 Conn. 702.

****Woodside's Est., 188 Pa. St., 45; Sites v. Eldridge, 45 N. J. Eq. 632; Fry v. Shipley, 94 Tenn. 252; Taubenhau v. Dunz, 125 Ill. 524.

*****Huffman v. Young, 170 Ill. 290; Pinney v. Newton, 66 Conn. 141; Boston Safe Dep. & Trust Co. v. Coffin, 152 Mass. 95; 8 L. R. A. 740.

tels," "effects," and the like, not used in a residuary clause, follow after and are coupled with words of a limited signification, the general words are restricted to the same clause as the particular ones. Thus where the bequest was worded "all of my jewelry, wearing apparel and personal effects," it was held that the general term "personal effects" did not extend the meaning to include furniture and pictures.*

10. When earlier and later clauses can not be reconciled, the later will *prima facie* overrule the former.** But clear gifts in one part of the will, will not be cut down or defeated, by doubtful or ambiguous language in a later part of the will; nor will such provisions be defeated by inadequate reasons given for making them, or by erroneous references to them in other parts of the will.***

11. Errors in punctuation, spelling, grammar or arrangement may be corrected in aid of the evident intention of the testator.**** And where the context re-

---

*Lippincott's Est., 173 Pa. St. 368; *In re* Reynolds, 124 N. Y. 388; Rawlings v. Jennings, 13 Ves. Jr. 39.

**Parks v. Kines, 100 Ind., 148; Carter v. Alexander, 71 Mo. 585; Davis v. Boggs, 20 O. S. 550. Now it is to be remembered in this connection that this rule is only applied where it is impossible for the court to construe the two classes of provisions so that both may be given some effect. Rogers v. Rogers, 49 N. J. Eq. 98; Claflin v. Ashton, 128 Mass. 441; Baxter v. Bowyer, 19 O. S. 490.

***Fahenstock's Est., 147 Pa. St. 327; *In re* Fisher, 19 R. I. 53.

****Lycan v. Miller, 112 Mo. 548; Black v. Herring, 79 Md. 146; Kinkele v. Wilson, 151 N. Y. 269; Thompson v. Thompson, 4 O. S. 333.

quires it, the word "and" may be read "or," and *vice versa.** So evident omissions appearing from the context may be supplied in some cases by the interpreting court.**

12. A lawful construction will always be preferred to an unlawful one.*** A just and reasonable one, to an unjust and unreasonable one.**** And one which will carry out the evident intention of the testator to one which will defeat such intention.

13. Some effect will always be given to the will, if possible, and it is only where a reasonable construction and discovery of the testator's intention is hopeless that the will should be allowed to fail. The mere fact that the testator's clearly expressed intention in the will is unjust, unfair, or even absurd as regards the disposition of his property, does not matter, and the court will usually give effect to such expressed intention.*****

14. Wills of real estate are to be construed according to the law of the place where the land lies. And wills of personal property are construed according to the law of testator's domicile. (See Ante, Sec. 1000.)

---

*Roe v. Vingut, 117 N. Y. 204; Doebler's App., 64 Pa. St. 9; Slingluff v. Johns, 87 Md. 273; Ward v. Barrows, 2 O. S. 241.

**Patterson v. Read, 42 N. J. Eq. 146; Heald v. Heald, 56 Md. 300; Glover v. Condell, 163 Ill. 566; Thompson v. Thompson, 115 Mo. 56.

***McBride's Est., 152 Pa. St. 192; Moore v. Powell, 95 Va. 258; Quincy v. Atty. General, 160 Mass. 431.

****Waters v. Waters (Ky.), 28 S. W. Rep. 958; Briant v. Garrison, 150 Me. 655; Bank's Will, 87 Md. 425.

*****Maurer v. Bowman, 169 Ill. 586; Moore v. Powell, 95 Va. 258.

15. While a codicil operates to revoke a will so far as it is inconsistent with such will, yet where the terms of the will clearly give an estate, the words of the codicil must manifest an equally clear intent to revoke the provision in the wills.*

(B.) SPECIAL RULES OF CONSTRUCTION.

Sec. 1017. PROVISIONS CONCERNING LAND. —The following special rules of construction have been formulated and applied to provisions in a will concerning land or real estate:—

1. The term "land" or "real estate," when used in a devise, may include leasehold interests, lands held as trustee or mortgagee, lands contracted for, and reversionary interests in lands.** Although the early decisions held that a devise of land *prima facie* passed a life estate only.***.

2. The terms "estate" and "property," though formerly otherwise, now *prima facie* include both real and personal property.**** But this broader meaning may be restrained by a different intention of the testator appearing in the context.*****

---

*Viele v. Keeler, 129 N. Y. 190; Sturgis v. Work, 122 Ind. 134.

**Watson v. Watson, 110 Mo. 164; Woodman v. Woodman, 89 Me. 128; High's Est., 136 Pa. St. 222; Smith v. Jones, 4 Ohio. 116.

***Page on Wills, Sec. 482.

****Flannery v. Hightower, 97 Ga. 592; Hofius v. Hofius, 92 Pa. St. 305; Taubenhau v. Dunz, 125 Ill. 524; Johnson v. Goss, 128 Mass. 433.

*****Dunham v. Marsh, 52 N. J. Eq. 256; Piersol v. Roop, 56 N. J. Eq. 739; Morgan v. McNeeley, 126 Ind. 537.

3. A devise of a house, mill, factory, store, and the like, *prima facie* passes not only the building so named, but the land under and adjoining such building, and such other privileges as its beneficial use and enjoyment render necessary.*

So a devise of realty by its popular name as "old homestead," "mountain lands," "old mill quarry," and the like, are sufficiently definite and will pass all of the property commonly known by such name.**

4. A devise of the rents and profits, or of the income of land, *prima facie* passes the land itself, in the absence of anything to indicate a contrary intention.*** But a devise of the use and occupation of lands does not *prima facie* require that the devisee shall occupy it in person.

5. A devise of an estate in lands without limitation, formerly carried a life estate only, but now, under the rule that a devise of land *prima facie* passed all of testator's interest therein, it carries all the estate which the testator has unless the contrary appears.****

6. Words ordinarily used in reference to personal property only, may also pass real estate where such was clearly the intention of the testator; thus the words

*Smith v. Dennis, 163 Ill. 631; McKeough's Est. v. McKeough, 69 Vt. 34.

**Moore v. Powell, 95 Va. 258; Horneby v. Davis (Tenn. Ch. App.), 36 S. W. Rep. 159; Beeres v. Narramoore, 61 Conn. 13.

***Hunt v. Williams, 126 Ind. 493; Baker v. Scott, 62 Ill. 86; Collier v. Grimesey, 36 O. S. 17; Ogle v. Reynolds, 75 Md. 145.

****Page on Wills, Sec. 482; Reid v. Walbach, 75 Md. 205.

"money," "effects," "personal effects," "surplus," and the like, have been held to pass real estate where it was clear from the will that this was the intention and desire of the testator.*

7. The testator may also devise property by referring to the source from which it was derived, and where this is done it passes all of such property whatever its form.** A devise of land may be made by reference to a plat or lot number,*** and the devisee takes such land only as is contained in such plat or lot. So a devise by metes and bounds although followed by a statement of the number of acres, passes only the land within such bounds.****

8. The common law rule restricting testator from devising by will land to be acquired after its execution has been abrogated by statute in the several States. But it is yet held that the testator must manifest an intention to dispose of after-acquired realty if it is to pass by his will. In some jurisdictions the devise is sufficient to pass such property if it would do so if owned at the time of making the will.***** Under other statutes the express intention of the testator to pass

*Adams v. Akerlaund, 160 Ill. 632; White v. Keller, 68 Fed. Rep. 796; Ruckle v. Grafflin, 86 Md. 627; Lamb v. Lamb, 131 N. Y. 227.

**Graham v. Knowels, 140 Pa. St. 325; Aydlett v. Small, 115 N. C. 1.

***Hospital v. Pa. Co., 158 Pa. St. 447.

****Priest v. Lackey, 140 Ind. 399; Higgins v. Gwenn, 100 Ill. 554; Oldham v. York, 99 Tenn. 68.

*****Jacob's Est., 140 Pa. St. 268; 11 L. R. A. 767; Hardenbergh v. Ray, 151 U. S. 112; Ruckle v. Grafflin, 86 Md. 627.

such property must appear, and the ordinary residuary clause will not answer.*

Sec. 1018. PROVISIONS CONCERNING PERSONAL PROPERTY.—The following are some of the more common special rules of construction concerning personal property.

1. The term "money" *prima facie* does not include promissory notes, bonds, stocks, mortgages or securities payable in money. It does *prima facie* include money in bank subject to check and money on special deposits.**

The terms "ready money," "money in hand," and "cash," are terms less comprehensive than "money" alone but "money due me" includes more than the term "money" and may embrace unpaid legacies, life insurance and the like.***

2. The terms "movables," "goods," "chattels," and "effects" *prima facie* include all of the testator's personal property of every kind. But this general meaning may be restricted or enlarged by the context. The word "furniture" originally included all chattel property used in connection with a household establishment.**** But this meaning has been changed so that

*Lorillard's Petition, 16 R. I. 254; Webb v. Archibald, 128 Mo. 299.

**Levy's Est., 161 Pa. St. 189; Smith v. Burch, 92 N. Y. 228; Sweet v. Burnett, 136 N. Y. 204; Manning v. Purcell, 7 De Gex M. & G. 55.

***Gillen v. Kimball, 34 O. S. 352; Miller's Est., 48 Cal. 165.

****Richardson v. Hall, 124 Mass. 228; Field v. Peckett, 29 Beav. 573.

the word now includes only the articles known as furniture, such as tables, desks, chairs and the like and would exclude other household goods.*

3. A gift of the "income," "interest," dividends" or "produce" of a fund, if without limitation as to time, *prima facie* carries the fund itself. And a bequest of stocks and bonds of a specified kind will pass other stock in the same corporation which the testator had secured by exchanging the bequeathed stock.**

Sec. 1019. PROVISIONS CONCERNING RELATIONSHIP, OR THE DESCRIPTION OF BENEFICIARIES.—The following special rules of construction ordinarily prevail unless changed by the evident intention of the testator appearing in the context, as regards the description of beneficiaries when such description pertains to their relationship to the testator.

1. The word "children," prima facie means legitimate children only.*** And does not include grandchildren or great-grandchildren unless such a construction is necessary to give the will effect, as where the testator at the execution of the will had no children but had grandchildren.**** The word does not include

*Ruffin v. Ruffin, 112 N. C. 102. The word furniture does not include money or books. Smith v. Jewett, 40 N. H. 513; Porter v. Tourney, 3 Ves. Jr. 311.

***In re* Howell-Shepherd, 3 Ch. 649.

***Wylie v. Lockwood, 86 N. Y. 291; McIntosh's Est., 158 Pa. St., 528; Arnold v. Alden, 173 Ill. 329.

****Gale v. Bennett, Amb. 681; Dunn v. Cory, 56 N. J. Eq. 507; Douglas v. James, 66 Vt. 21.

step-children, unless the context and surrounding circumstances show such an intention. And when the intention, as derived from the circumstances and surrounding facts is clear, the term "children" may include the illegitimate children of the testator.*

Children in being but not yet born, technically called *en ventre sa mere,* are considered in law the same as other children and in all cases take under a devise or bequest to the "children" of its parents.**

2. A gift to brothers and sisters will ordinarily include half brothers and sisters.*** And a gift to nephews and nieces will include children of half brothers and sisters, but not ordinarily grand nephews and grand nieces.****

3. The term "descendants" *prima facie* includes issue of every degree from the testator, but does not include those related collaterally or in the ascending line.***** The word "issue" or "offspring" also means legitimate lineal descendants of any degree; but if reference is made to their parents, the terms may be narrowed to mean the same as "children."******

*Kurtz's Est., 145 Pa. St. 637; *In re* Harrison, 1 Ch. 561; Sullivan v. Parker, 113 N. C. 301.

**MacLain v. Howald, 120 Mich. 274; Starling v. Price, 16 O. S. 29.

***Yetter's Estate, 160 Pa. St. 506.

****_In re_ Woodward, 117 N. Y. 522; 7 L. R. A. 367; Root's Est., 187 Pa. St. 118.

*****Bates v. Gillett, 113 Ill. 287; Tichenor v. Brewer's Est., 98 Ky. 349. Contra, Turley v. Turley, 11 O. S. 173. In this case "descendants" is held to include both lineal and collateral relations.

******Bigelow v. Morong, 103 Mass. 287; Chwatel v. Schrei-

4. The word "relations" or "relatives" *prima facie* means those who are related by blood and not by marriage, that is, it includes those related by consanguinity, and excludes those related only by affinity, this legal meaning being opposed to the common or popular meaning of these terms.* The terms include heirs at law in a gift of real estate and those who would take by distribution in the case of a bequest of personal property, that is, the use of these words restrict the beneficiaries in law to those who would take under the statutes of descent and distribution, unless the context or surrounding circumstances show that the words were used in a different sense by the testator.**

5. A gift to the family of a designated person was formerly held void for uncertainty;*** but it is now well settled that a gift of either real or personal property to the family of a named person is valid, and *prima facie* passes the property to such person's children only, unless the context shows a different intention.**** So

---

ner, 148 N. Y. 683; Arnold v. Alden, 173 Ill. 229; Madison v. Larmon, 170 Ill. 65. In the last case it is said: "Where the word 'issue' is used with reference to the parent of such issue, and where the issue is to take the shares of the deceased parent, it must mean his children; that is, the word 'parent' confines the word 'issue.'"

*Esty v. Clark, 101 Mass. 36; Drew v. Wrightson, 60 Md. 198.

**Hall v. Wiggin, 67 N. H. 89; *In re* Jordell, L. R. 44, Ch. D. 590.

***Robinson v. Waddelow, 8 Sim. 134; Warner v. Rice, 63 Md. 436.

****Flourmour v. Johnson, 7 B. Mon. 693; Phillips v. Ferguesen, 85 Va. 509, 1 L. R. A. 897.

where there are no children in the family, such a gift may include the next of kin.* The rule is not yet uniform in all jurisdictions and whether the wife of the person is included in such a gift to a "family" is held both ways.**

6. "An heir is he upon whom the law casts the estate immediately upon the death of the ancestor."*** This definition of an heir applies when the term is used in reference to real estate, and the word "heir" or "heirs" when used in reference to personal property, *prima facie* means those who would take under the statute of distribution. These meanings of the word heirs are to be employed in the construction of the will unless a different intention is manifested by the testator from the whole will or the surrounding facts and circumstances.**** That is, "heirs" when applied to inheritance of real estate primarily means those persons who would take such property by the law of descent if there had been no will, and "heirs" as applied to

*Smith v. Grieley, 67 N. H. 377.

**Cosgrove v. Cosgrove, 69 Conn. 416; Bates v. Dewson, 128 Mass. 334; White v. White, 30 Vt. 338. These cases hold the word "family" includes the members of the same household and that the wife is one of the household. Hoadley v. Wood, 71 Conn. 452, holds that the wife is not included in a gift to a "family," the word excluding both spouses and including only the children.

***2 Bl. Com. 201; Lincoln v. Perry, 149 Mass. 368; Page on Wills, Sec. 512.

****Keay v. Boulton, 25 Ch. D. 212; Kendall v. Gleason, 152 Mass. 457, 9 L. R. A. 509; Swenson's Est., 55 Minn. 300; Allen v. Craft, 109 Ind. 476; Johnson v. Brasington, 156 N. Y. 181; Harman's App., 135 Pa. St. 441.

personal property primarily means those who would take under the statute of distribution if there was no will.

7. The surviving husband or wife is not the heir of the other, within the ordinary meaning of a will;* but may become such an heir technically where the statutes of descent and distribution use the word "heir" so as to include such surviving spouse.**

The meaning of the term "heir" or "heir at law" is not inflexible, and is to be construed so as to carry out the testator's manifest intention. The court in construing the term will seek to discover the sense in which the word was used by the testator, and the general meaning may be extended or restricted by the context and surrounding circumstances.***

8. The phrases "next of kin," "nearest kindred," and the like, mean substantially the same thing, that is, the nearest blood relations, and ordinarily do not mean or include all those who would take under the statute of distribution. They do not include the husband or wife, and embrace primarily those standing in the nearest degree of consanguinity—that is, a gift to the "next of kin" would prefer a brother to nephews,

---

*Dodge's App., 106 Pa. St. 216; Wilkins v. Ordway, 59 N. H. 378.

**Holmes v. Hancock, 158 Mass. 398; Durfee v. MacNeil, 58 O. S. 238; Olney v. Lovering, 167 Mass. 46.

***Swenson's Est., 55 Minn. 300; McKelvey v. McKelvey, 43 O. S. 213; Gordon v. Small, 53 Md. 550.

or the sons of a deceased brother.* A gift to the "next of kin" creates a joint tenancy in the nearest blood relations who are of equal degree of relationship.

9. The word "cousin" when used by a testator primarily means a first cousin, that is, a son or a daughter of an uncle or an aunt.** By "second cousin" is primarily meant a child of a first cousin of a parent whose relationship to such child is in question.*** Legally, a second cousin is to be distinguished from a first cousin once removed, by which is meant a child of testator's first cousin.**** These meanings may be varied by the context and circumstances showing that a different application of the terms was made by the testator.*****

10. When the word "representatives" is used in a will, its primary meaning is that of "legal personal representatives," or the executors and administrators of testator.****** But this *prima facie* meaning may be changed by the language or circumstances which show that the testator meant to use the term with some other significance, as lineal descendants, and the like.*******

11. The word "survivors," used in reference to a class of persons, limits the devise or bequest to those

---

*Swasey v. Jaques, 144 Mass. 135; Fargo v. Miller, 5 L. R. A. 690; 150 Mass. 225; Redman v. Burroughs, 63 N. C. 242.

**White v. Mass. Inst. of Tech., 171 Mass. 84.

****In re* Parker, 15 Ch. Div. 528; Page on Wills, Sec. 532.

*****In re* Parker, 15 Ch. Div. 528.

******Page on Wills, Sec. 532; *In re* Bonner, 19 Ch. Div. 201.

*******In re* Ware, L. R. 45 Ch. Div. 269; Page on Wills, Sec. 533.

********Staples v. Lewis, 71 Conn. 288; *In re* Bates, 159 Mass. 252.

composing such class, and excludes their children or heirs.*

A gift to "legatees" is held to include an executor who has been bequeathed property in trust for others, and any one taking a bequest under a will is considered a legatee, unless such bequest is a mere memento and of small value.**

Sec. 1020. GIFTS TO A CLASS CONSIDERED.—By a gift to a class, in the construction of wills, is meant that a stated sum is given to a group of persons, which group may be either definite in number at the time of the gift or to be ascertained at a future time, and these persons when ascertained are to take in equal or other stated proportions, the share of each being dependent for its amount upon the ultimate number of persons in the group.***

The gift to a class is usually expressed by designating the group as "children," "nephews," "grandchildren," and the like, without naming the individuals composing such class.**** But though the members of the class are named, where the context shows that this was done for the purpose of certainty in designating the class, and the devise is not in severalty to

---

*Coleman, Etc., Co. v. Figg., 25 S. W. Rep. 888.

**Logan's Est., 131 N. Y. 456; Neville v. Dulaney, 89 Va. 842; White v. Mass. Inst. of Tech., 171 Mass. 84.

****In re* Brown, 154 N. Y. 313; Inje v. Jones, 109 Ala. 175.

****Pendleton v. Kinney, 65 Conn. 222; Dryer v. Crawford, 90 Ala. 901; Bailey v. Brown, 19 R. I. 669.

such named persons, it will be held a gift to a class rather than to them individually.*

The reason for distinguishing a gift to a class from one to individuals distributively, is the peculiar rules applicable in cases of gifts to a class. These rules are as follows:

1. Where a gift is made to a class, as to the testator's children, the gift is *prima facie* to those of the class who are living at the time of the testator's death.**

2. When a gift is made to a class and such gift is, by the terms of the will, to take effect in the future, persons born after the death of the testator, of the same class, will be admitted to share in such gift, up to the time of distribution.***

3. Where each member of such a class is to receive his share at a different time, as on arriving at the age of majority where the gift is to grandchildren, then the period of distribution is when the first one of such class is entitled to his share, and those born afterwards are excluded, that is, those born after the first

---

*Swallow v. Swallow, 166 Mass. 241; Bolles v. Smith, 39 Conn. 217. In Dildine v. Dildine, 32 N. J. Eq. 78, a gift "to my brothers, Ralph and Abraham," is held not to be a gift to the brothers as a class, but to them individually; see also Bill v. Payne, 62 Conn. 140; Moffett v. Elmendorf, 152 N. Y. 475.

**Howland v. Slade, 155 Mass. 415; Kellett v. Shepherd, 139 Ill. 433; Triewig's Est., 169 Pa. St. 61.

***Doe v. Sheffield, 13 East. 526; Sinton v. Boyd, 19 O. S. 30; Wilson v. White, 109 N. Y. 59; Evan's Est., 155 Pa. St. 646.

member has received his share, are to be excluded from the class.*

4. Where a devise is given to a class under some general name, other than "heirs at law," as to children, descendants, and the like, they will ordinarily take *per capita,* that is, by head as they then exist, and not *per stirpes,* that is, by "stock" or representation.** Where the gift is to the class as "heirs at law," "heirs," and the like, they will usually take *per stirpes,* that is, according to the principle of representation as heirs of deceased members of such class.*** But the rule in

---

*Thomas v. Thomas, 149 Mo. 426.

**Wells v. Hutton, 77 Mich. 129; Budd v. Haines, 52 N. J. Eq. 488.

"First, with reference to the determination of the persons who shall take, a distribution *per stirpes* means that the principle of representation so applies that the heirs or representatives of one previously deceased, who would have taken if alive, will take by the right of their ancestor. A distribution *per capita,* means that no representation applies, and that the favored class is to be determined as it exists at the time prescribed by the law or the will, and that the heirs or representatives of one previously deceased cannot take, although such decedent would have taken in his own right, as a member of the favored class, had he survived.

"Second, with reference to the share which the beneficiaries thus indicated are to take, . . . A distribution *per capita* is an equal division of the property to be divided among the beneficiaries, each receiving the same share as each of the others, without reference to the intermediate course of descent from the ancestor. A distribution *per stirpes,* on the other hand, is a distribution with reference to the intermediate course of descent from the ancestor. It is literally a distribution according to 'stock.'"—Page on Wills, Sec. 552.

***Healy v. Healy, 70 Conn. 467; Richey v. Johnson, 30 O. S. 288; Rowland's Est., 151 Pa. St. 25.

every case gives way to an evident intention on the part of the testator to the contrary.*

5. As a rule, legatees, take *per capita,* unless a contrary intention appears from the will. At common law and usually under the modern statutes of descent and distribution, in cases of intestacy, where the heirs are all of the same degree of relationship to the ancestor, they take *per capita,* while if related in unequal degrees, they take *per stirpes.* And this rule is followed in the construction of a will where the intention of the testator is not clear as to whether the beneficiaries are to take *per capita* or *per stirpes.***

6. At common law, and under modern law, unless the statutes change the rule, or the testator indicates a different intention, where the gift is made to a class and a member or members of such class dies before the time of the distribution of the gift, their share lapses and does not pass to the children or descendants of such deceased members.***

Sec. 1021. RESIDUARY CLAUSES.—By a residuary clause is meant that portion of testator's will which passes property not otherwise disposed of; that

*West v. Rassman, 135 Ind. 278; Kling v. Schnellbecker, 107 Ia. 636; Howard v. Howard, 30 Ala. 391.

**Pearce v. Rickard, 18 R. I. 142; 19 L. R. A. 472; Huggins v. Huggins, 72 Ga. 825; Kilgore v. Kilgore, 127 Ind. 276; Hills v. Barnard, 152 Mass. 67; 9 L. R. A. 211.

***Ashhurst v. Potter, 53 N. J. Eq. 608; Hardin v. Arteburg, 20 Ky. L. R. 486; Bradley's Est., 166 Pa. St. 300; Swallow v. Swallow, 166 Mass. 241; Strong v. Smith, 84 Mich. 587; Bragg v. Carter, 171 Mass. 324; Howland v. Slade, 155 Mass. 475.

is, the residuum of his estate. Residuary clauses may be either general or particular: the first disposing of all remaining property, the latter only certain specified property.

A residuary clause usually comes at the close or end of a will but not necessarily so, and such a clause usually contains words showing that it is the remainder or undisposed portion of testator's estate that such clause is to pass, but the technical words "residuum," "remainder," "rest and residue," are not necessarily required to show the testator's intention that it is a residuary clause. Any language which shows the clear intention of the testator to dispose of the residue of his property may be construed a residuary clause.*

The following rules are usually followed in the construction of residuary clauses:

1. A residuary clause will be liberally construed to prevent partial intestacy (Lamb v. Lamb, 131 N. Y. 227).

2. A general residuary bequest *prima facie* carries whatever personal estate remains undisposed of, including that left because of lapsed or void legacies.** Such a bequest would include the income from a fund

*Cheney v. Plumb, 79 Wis. 602; Striewig's Est., 169 Pa. St. 61; Morgan v. Huggins, 42 Fed. Rep. 869; Tompkins Est., 154 N. Y. 634.

**Buchanan v. Lloyd, 64 Md. 306; Burke v. Stiles, 65 N. H. 163; Miller's App., 113 Pa. St. 459; Rotch v. Loring, 169 Mass. 191.

acquired before its vesting under the terms of the will.*

3. Under the old law, a general residuary devise, did not carry specific devises which lapsed or were void, but the modern rule is to the contrary, and all property not otherwise disposed of, and not specifically excepted from the operation of such clause will pass, including lapsed and void legacies.** The only exception to this is that where the legacy which has lapsed or become void is itself contained in the residuary clause and gives the entire residuum, or a definite portion of it, to the beneficiary, in such cases the legacy descends or is distributed as in cases of intestacy.***

Sec. 1022. KINDS OF ESTATES THAT MAY BE GIVEN BY WILL.—The testator may, if his intention is properly and clearly expressed, devise the absolute title to an estate, that is, a *fee simple,* or he may devise a life estate with a remainder over, or he may devise a fee-tail estate, or an estate upon condition, and his intention will be given effect by the courts. So he may devise land to beneficiaries in severalty, in common, or as joint tenants. While the nature of these various estates pertains to the subject of real property, and are to be considered in a later number

*_In re_ Allen, 151 N. Y. 243; Minot v. Baker, 147 Pa. St. 348.

**Moffett v. Elemendorf, 152 N. Y. 475; Lamb v. Lamb, 131 N. Y. 227; Page on Wills, Sec. 507.

***Gray's Est., 147 Pa. St. 67; Chadwick v. Chadwick, 37 N. J. Eq. 71.

of The Home Law School Series, yet a slight reference to them will be made here.

1. It was the rule at common law that the technical word "heirs" had to be used in order to pass a fee simple estate by deed.* And that to devise such an estate, either this, or other equivalent words, had to be used; so that if it did not appear in the will whether a life estate or a fee was intended, a life estate only passed.**

Under the modern rule, and by statute, a devise of lands passes a fee or all the estate which the testator has, unless there is a plain intention from the language used that a less estate is meant to pass.***

, 2. At the common law, and under modern law, where not changed by statute, or judicial construction, a rule of property known as the Rule in Shelley's Case, prevails, and this rule provides that where in a deed or in a will a freehold estate is given and in the same instrument a remainder over is given to the "heirs" of such grantee or devisee, the grantee or devisee takes a *fee simple* in case the remainder is given to his heirs generally, and a *fee tail* if remainder is given to the heirs of his body.**** This rule prevailed at the com-

*Robinson v. Ostendorff, 38 S. C. 66; Roy v. Rowe, 90 Ind. 54.

**Toman v. Dunlop, 18 Ky. 252; Mulvane v. Rude, 146 Ind. 476.

***Mulvane v. Rude, 146 Ind. 476; Simonds v. Simonds, 168 Mass. 144; Flickinger v. Saum, 40 O. S. 591; Potter v. Couch, 141 U. S. 296.

****Shelley's Case, 1 Rep. 93; Allen v. Craft, 109 Ind. 476; Anders v. Gerhard, 140 Pa. St. 153.

mon law regardless of the intention of the testator, being a rule of property rather than a rule of construction.* But under modern law, and by statute in some States, the Rule in Shelley's Case is treated as a Rule of construction, and where this is the case, the Rule will not be made to violate the plain intention of the testator.**

3. A *fee-tail,* or an estate-tail, by this is meant an estate of inheritance, which by the terms of the grant is to descend to the heirs of the grantee's body instead of to his heirs generally.*** Such an estate may be created by will by the use of the technical words "heirs of his body," or by other words of similar import, as, a devise to A "and her issue."**** So by another early case, at common law, a devise to a person and his children, such person having no children at the time, was equivalent to a devise to such person and the heirs of his body, and thus created and estate-tail.***** Modern statutes are opposed to allowing the owner of property to impose restraints upon its alienation, and in many States the common law phrases creating estates-

---

*Ewing v. Barnes, 156 Ill. 61; Sheeley v. Neidhammar, 181 Pa. St. 163; Turley v. Turley, 11 O. S. 173; Chambler v. Broughton, 120 N. C. 170.

**Healey v. Healey, 70 Conn. 467; Wood v. Wood, 45 S. C. 590; Bunnell v. Evans, 26 O. S. 409.

***Page on Wills, Sec. 566.

****Ralston v. Truesdell, 178 Pa. St. 429; Harkness v. Corning, 24 O. S. 416; Barber v. Pittsburg, etc., Ry. Co., 166 U. S. 83.

*****Wild's Case, 6 Rep. 17; Hood v. Dawson, 98 Ky. 285; Silliman v. Whitaker, 119 N. C. 89.

tail, are held to pass a *fee simple* to the first taker.* In some States the first taker is given a life estate only and the next person entitled a *fee simple* at the decease of the first.** While in other States the first taker has an estate-tail, subject to dower and courtesy, with remainder in *fee simple* to those who are to take at his death.***

4. A life estate may be created by will, but it must appear from the language of the will that such is the intention of the testator. No technical language is necessary, thus a devise to one "for the term of his natural life," "during his life," or a provision that at the death of the devisee the property shall go to some one else, all create life estates.****

So where the testator has created a fee in the first taker and then devises the same property over to another after the death of the first taker, such a devise over may, and usually does, show that the testator intends to give the first taker a life estate only.***** But a devise over of what may be left of an "unexpended

---

*Granger v. Granger, 147 Ind. 95; Sheeley v. Neidhammar, 182 Pa. St. 163.

**Wood v. Kice, 103 Mo. 329; St. John v. Dann, 66 Conn. 401.

***Phillips v. Herron, 55 O. S. 478; Page on Wills, Secs. 568, 569.

****Perry v. Bowman, 151 Ill. 25; Smith v. Runnells, 97 Ia. 55; Rice v. Moyer, 97 Ia. 96; 66 N. W. Rep. 94.

*****Terrell v. Reeves, 103 Ala. 264; Littlewood's Will, 96 Wis. 608.

part," and the like, will not cut down the gift of a fee simple.*

The Rule in Shelley's Case must be remembered in this connection, since if the remainder over is to the heirs of the first taker and the Rule is enforced, such a gift becomes a fee simple.

5. Where a fee simple is devised, the fact that the testator has added a power to dispose of such an estate, does not cut down such a fee to a life estate.** Neither will the fact that testator attempts to say who shall inherit after the tenant in fee, as this provision is inconsistent with such an estate and void.*** But adding a power of alienation may make it clear that an ambiguous devise was intended to pass a fee to the first taker.**** So a gift of a life estate with absolute power to dispose of the remainder enlarges such a devise to a fee simple in the first taker.***** While if the power of disposition or alienation is qualified and limited so as to be capable of being exercised only under certain conditions, such power will not enlarge a life estate to a fee.******

*Bentz v. Fabian, 54 W. J. Eq. 615; Wolfer v. Hemmer, 144 Ill. 554.

**Veeder v. Meader, 157 Mass. 413; Forbes v. Darling, 94 Mich. 621; Cressler's Est., 161 Pa. St. 427.

***Bradley v. Carnes, 94 Tenn. 27; Good v. Fichthorn, 144 Pa. St. 287.

****Kieffel v. Keppler, 173 Pa. St. 181; Welsh v. Woodbury, 144 Mass. 542.

*****Hood v. Bramlett, 105 Ala. 666; Halliday v. Strickler, 78 Ia. 388.

******Peckham v. Lego, 57 Conn. 553; L. R. A. 419; Gadd

6. A remainder, is the portion of an estate left after the termination of a prior estate created by the same instrument establishing the remainder. An estate in remainder is created wherever it is clear from the testator's language that an estate granted shall terminate upon the happening of a specified event, or at the end of a time stated, and that the estate shall thereupon pass to another.* Thus a gift to A, remainder to the lawful heirs of her body, and if she dies without lawful heirs, to B, gives B a remainder, and a devise to the daughters or sons of testator and at their death to the children of such daughters or sons, create a remainder in such children.**

A remainder may be limited upon any estate short of a fee simple, or the absolute gift of personal property.*** A remainder is void if limited upon a fee simple, unless the two gifts may be reconciled by construing the first as a life estate.**** And any remainder over will be void if it conflicts with the rule of law against perpetuities, or if the beneficiary of such a remainder is not sufficiently definite.*****

---

v. Stoner, 113 Mich. 689; Donley v. Shields, 14 Ohio, 359; Yetter's Est., 160 Pa. St. 506.

*Bird v. Gilliam, 121 N. C. 326; Wallace v. Denning, 152 Pa. St. 251; Barclay v. Platt, 170 Ill. 384.

**Bird v. Gilliam, 121 N. C. 326; Collins v. Williams, 98 Tenn. 525.

***Fisher v. Wister, 154 Pa. St. 65; Wilmoth v. Wilmoth, 34 W. Va. 426; Hovey v. Walback, 100 Cal. 192.

****Stiness v. Gardnes, 88 Ia. 307; Robertson v. Hardy, 23 S. E. Rep. 767.

*****Post v. Rohrbach, 142 Ill. 600; Keaney v. Keaney, 72 Md. 41.

7. Where the interest of the beneficiary is in severalty, he alone has the exclusive right to the possession and control of the property. If the interest is in common, the beneficiary has an interest which will descend the same as an interest in severalty, but his right of enjoyment is subject to the common rights of the other tenants.* If the interest is a joint estate or joint interest it vests in all the beneficiaries as one tenant, and the interest of one passes at his death to the surviving joint tenants instead of to his heirs or devisees.**

A devise of land to two or more was presumed to create a joint tenancy at common law.*** But this rule is changed in most jurisdictions either by statute or judicial decision, and such grants are presumed to create an estate in common.****

8. Estates may be granted upon condition, that is, upon the happening, or failure to happen, of some future specified event or contingency. These conditions are either precedent or subsequent. A condition precedent vests or enlarges the conditional estate upon the happening or not happening of the event. A condition subsequent terminates a vested estate upon the happening or not happening of the event.*****

*Tompkin's Est., 154 N. Y. 634.

**Rockwell v. Swift, 59 Conn. 289.

***Binning v. Binning, 13 Rep. 554; Noble v. Teeple, 58 Kan. 398.

****McCord v. Whitehead, 98 Ga. 381; Tompkin's Est., 154 N. Y. 634.

*****Abbott's Law Dict. "Condition;" Tilley v. King, 109 N. C. 461; Moore v. Perry, 42 S. C. 369.

A condition specified by the testator, upon the happening of which an estate is to begin or to terminate, is to be distinguished from a mere statement of the motive or inducement which has caused the testator to bestow a gift. Thus if it is an unqualified direction that the devisee shall perform an act specified before the estate should vest or that the estate given should fail if the act was not performed, it is a conditional estate; while if it is an expression of gratitude toward the devisee for services to be rendered, or in consideration of kindness or attention paid to the testator, it will be construed to be an expression of motive and not a condition.*

If a condition precedent fails, that is, if it is unperformed or becomes impossible to perform, the estate to pass by it is defeated, and nothing can ever pass to the devisee or his descendants.** When a condition subsequent becomes impossible, that is, when it is clear that the contingency which is to terminate the estate can never happen, the devisee's estate becomes a permanent fee and can never be divested.***

The following conditions are held to be valid. A condition that the estate shall vest only on the birth of issue to the devisee is valid, if the birth of the issue is not so remote as to violate the rule against perpetui-

*Tilley v. King, 109 N. C. 461; Whiting's App., 67 Conn. 379; McCarty v. Fish, 87 Mich. 48; Chassaing v. Durrand, 85 Md. 420.

**Starke v. Conde, 100 Wis. 633.

***Conrad v. Long, 33 Mich. 78; Morse v. Hayden, 82 Me. 227.

ties.* So conditions that the devisee shall support the wife of testator or other named persons;** that the devisee shall marry, or reform and become temperate in habits;*** that the devisee shall not prefer a claim against the testator's estate;**** and that the surviving spouse shall not remarry, or that the devisee shall not marry a certain individual, or within a certain class, are valid.*****

The following conditions are held invalid; a condition in restraint of a first marriage, or of marriage generally, except as above stated;****** a condition repugnant to the nature of the estate granted, as a limitation imposed upon a fee simple;******* a permanent restraint on alienation, and the like.********

Conditions which seek to interfere with the religious belief of the devisee, as by compelling membership in a certain church, are usually void as being con-

*Carney v. Cain, 40 W. Va. 758; Baker v. McLeoud, 79 Wis. 534.

**Gingrich v. Gingrich, 146 Ind. 227; Richards v. Richards, 90 Ia. 606.

***Hawke v. Euyrat, 30 Neb. 149; 27 Am. St. Rep. 149; Cassen v. Kennedy, 147 Ill. 660.

****Bradford v. Bradford, 19 O. S. 546. Smithsonian Inst. v. Meech, 169 U. S. 398; Rockwell v. Swift, 59 Conn. 289. Contra, Vandervort's Est., 62 Hun. 612.

*****Bennett v. Packer, 70 Conn. 357; Boyd v. Sachs, 78 Md. 491; Redding v. Rice, 171 Pa. St. 301; Greene v. Kirkwood, 1 Ir. 130.

******_In re_ Denfield, 156 Mass. 265; Hogan v. Curtain, 88 N. Y. 162; Maddox v. Maddox, 11 Gratt. (Va.) 804.

*******Conger v. Lowe, 124 Ind. 368; Cushing v. Spalding, 104 Mass. 287; Potter v. Couch, 141 U. S. 296.

********Williams v. Herrick, 19 R. I. 42; Cushing v. Spalding, 164 Mass. 287.

trary to public policy;* and so are conditions which operate to induce husband and wife to live apart or get divorced.**

It is an implied condition that a devisee under a will, will not murder the testator, and if he does so he is held to forfeit all of his rights under the will (Riggs v. Palmer, 115 N. Y. 506).

9. An executory devise is a peculiar estate which may be created by a will. An executory devise is defined to be, "A devise of some future interest in lands, given not to take effect immediately upon testator's death, but to arise and vest upon some future contingency."*** This estate has no reference to the existence or continuance of any intermediate or prior estate, as is the case in remainders, so that even if the first taker has the implied power to dispose of the property and thus destroy the executory devise, such devise is not therefore void.****

10. A life estate in personal property may be created by the testator by the use of appropriate language.***** So such an interest in personalty may be created by using qualifying words after an absolute

*Maddox v. Maddox, 11 Gratt. (Va.) 804. Such conditions may be valid under very strict construction. McBride's Est., 152 Pa. St. 192.

**Wrenn v. Bradley, 2 De Gex. & S. 49; Hawke v. Euyart, 30 Neb. 149.

***Abbott's Law Dict., "Executory Devise."

****Page on Wills, Sec. 578; Fisher v. Wister, 154 Pa. St. 65.

*****Thieme v. Zumpe, 152 Ind. 359; Nevinn's Est., 192 Pa. St. 258.

gift.* If such property is bequeathed in trust the first taker has no right to its possession, but only to the income; but if there is no trust he may possess himself of the *corpus* of the property.** By statute, and by judicial decision, the first taker of such property may be required to give bond for its safe keeping and repayment at the end of his enjoyment of it.

Sec. 1023. WHEN DEVISES AND LEGACIES WILL VEST.—The interest of the beneficiary under a will may be either vested or contingent. A vested interest means one which gives the beneficiary a present fixed right, either of present enjoyment or a future enjoyment.*** A contingent interest is one in which there is no present fixed right of either present or future enjoyment, but which may become a fixed right in the future on the happening of a specified event.****

When the interest of the beneficiary is vested, it will pass to his heirs or devisees although the beneficiary dies before coming into the enjoyment of the estate, that is, it does not matter whether the prior estate has terminated or not.***** While if the interest is contingent, and the beneficiary dies before the termination

*Piersol v. Roop, 56 N. J. Eq. 739; Smith v. Bell, 6 Pet. 68.

**LaBar's Est., 181 Pa. St. 1; Fox v. Senter, 83 Me. 295; *In re* McDougall, 141 N. Y. 21; Pendleton v. Kinney, 65 Conn. 222.

***Page on Wills, Sec. 656; Cox v. Handy, 78 Md. 108.

****Spear v. Fogg, 87 Me. 132; Hale v. Hobson, 167 Mass. 397.

*****Chapin v. Parker, 157 Mass. 63; McClain v. Capper, 98 Ia. 145.

of the prior estate, the remainder fails.* It is to be remembered, however, that a vested remainder may be defeated by the happening or not happening of a condition subsequent.** And that vested remainders devised to a class, as the children of testator, may open after the death of the testator to let in children born after testator's death.***

Concerning the vesting of devises and legacies, the following general rules of construction may be laid down:

1. In construing remainders and conditional estates, the law favors that construction by which a devise or legacy will be vested rather than contingent, and absolute rather than conditional.**** Thus remainders are usually held, in the absence of a plain intention to the contrary, to vest at the death of the testator.*****

2. Though the authorities are not uniform, the general rule is, that words of survivorship in reference to both real and personal property will refer to the time when the property is to be divided, that is, to the time of testator's death if there be no intervening es-

*Shaw v. Eckley, 169 Mass. 119; Watson v. Smith, 110 N. C. 6; Cummings v. Sterns, 161 Mass. 506.

**Mulreed v. Clark, 110 Mich. 229; Brasher v. Marsh, 15 O. S. 103.

***Cherbonner v. Loodwer, 79 Md. 55; Field v. Peeples, 180 Ill. 376; Lasey v. Stanley, 147 N. Y. 560.

****Bonner v. Young, 69 Ala. 35; Lovass v. Olson, 92 Wis. 616; Gingrich v. Gingrich, 146 Ind. 227; Newberry v. Hinman, 49 Conn. 130.

*****Page on Wills, Sec. 658; Harrison v. Moore, 64 Conn. 344; Collier's Will, 40 Mo. 287; Linton v. Laycock, 33 O. S. 128.

tates, but if there are intervening estates, then to the time of their termination.*

3. Where there is a gift to one person with a remainder over to another in case of his death, or in case of his death without "heirs" or without "issue," this is construed to mean his death without heirs or issue, before the time for payment or distribution; that is, before the death of testator. In such a case if the first taker dies during the testator's life or before the time set for the payment of the legacy, the gift over takes effect, otherwise the gift becomes vested as an absolute fee simple and the remainder over is nullified.**

Sec. 1024. CLASSES OF DEVISES AND LEGACIES.—Legacies and devises are divided into three classes, namely, general, specific and demonstrative.

1. A general legacy or devise is one which may be satisfied from any part of the testator's property or money, and which does not specify the property or fund from which it is to be paid.***

2. A legacy or devise is specific when it can be satisfied only by the transfer or delivery of some particular portion of, or article belonging to the estate, which portion or article the testator intended should

*Dimmick v. Patterson, 142 N. Y. 322; Wilson v. Wilson, 40 N. J. Eq. 321; Bailey v. Hawkins, 18 R. I. 573; Wilson v. Bryan, 90 Ky. 482; Dean v. Winton, 150 Pa. St. 227; Colby v. Doty, 158 N. Y. 323.

**Walsh v. McCutcheon, 71 Conn. 283; Baker v. McGrew, 41 O. S. 113; Keating v. McAdoo, 180 Pa. St. 5.

***Kelly v. Richardson, 100 Ala. 584; Hughes v. Hughes, 91 Wis. 138.

be transferred to the legatee in specie. Thus a gift of the testator's watch, a gift of money deposited at a certain bank, a gift of property invested in a certain business, a gift of an amount due from a certain debtor, are all specific gifts.*

4. "A demonstrative legacy is one which is general in its nature, but which is made payable out of certain specified property, either real or personal."** Thus a bequest of a sum of money payable out of a particular sum of money, or a specified fund, is a demonstrative legacy. It is equivalent to a devise or bequest of so much or such a part of a fund or thing specified.***

If the property or fund from which a demonstrative legacy is directed to be paid does not exist such legacy is payable out of the general property of the testator. While if the designated fund is in existence, the demonstrative legacy must be paid out of it in preference to other legacies. (Hammer's Est., 158 Pa. St. 632; Dumford v. Jackson, 22 S. E. Rep. 853.)

5. A specific legacy takes priority over a general legacy, in case of a deficiency of assets, and does not suffer abatement with the general legacies, unless such

---

*Bryne v. Hume, 86 Mich. 546; Crawford v. McCarthy, 159 N. Y. 514; Kelly v. Richardson, 100 Ala. 584.

**Page on Wills, Sec. 770; Hibler v. Hibler, 104 Mich. 274; Glass v. Dunn, 17 O. S. 413.

***Roquette v. Eldridge, 118 Ind. 147; Wyckoff v. Perrine's Est., 37 N. J. Eq. 118; *In re* Hodgman, 140 N. Y. 421.

is the plain intention of the testator.* Where the subject of a specific legacy is disposed of after the will is made, so that it does not exist in specie at the testator's death, or it has been so changed that it can not be called the same thing, the bequest fails, and the legatee is not entitled to money in lieu of it.**

6. A demonstrative legacy, will be made good out of the other assets in case the fund provided for its payment fails. In case of a deficiency of assets it does not suffer abatement like a general legacy.***

In case of a deficiency of assets, all general legacies abate *pro rata,* unless some particular general legacy is granted on a valuable consideration, in which case it may have priority over other general legacies.**** This rule as to legacies given upon a valuable consideration, applies to make a specific legacy granted upon a consideration take priority over others of its class.*****

7. An abatement of legacies is necessary when the testator's property is insufficient to pay debts and expenses which are a prior lien, and all other legacies in full. When there is such a failure, and the testator has not indicated the manner in which legacies shall abate, the rules of law above given apply as to the

*Kelly v. Richardson, 100 Ala. 584; Myers v. Myers, 88 Va. 131; Dunn v. Renick, 40 W. Va. 349.

**Bryne v. Hume, 86 Mich. 546.

***Lake v. Copeland, 82 Tex. 464; Bryne v. Hume, 86 Mich. 546; Petre v. Petre, 14 Beav. 197; Sykes v. VanBibber, 88 Md. 98.

****Kelly v. Richardson' 100 Ala. 584; Henry v. Griffis, 89 Ia. 543; Rumsey v. Otis, 133 Mo. 85; Taylor's Est., 175 Pa. St. 60.

*****Taylor's Est., 175 Pa. St. 60.

order in which legacies shall abate. And under these rules the legacies and devises given in the residuary clauses abate first.* That is, no payment can be made to a residuary legatee until all other legacies have been paid in full. General legacies are the next in order to abate, as above stated.

8. At common law personal property was first held liable for the debts and legacies of the testator, and the realty was only charged by express provision that it should be. Statutes in the various States have changed this rule as to the testator's debts, which are payable out of the realty when the personalty is insufficient. In some States the common law rule so far applies that all legacies abate before land specifically devised can be sold for testator's debts.** "Thus, it is said that in the absence of any provision in the will for testator's debts, they are to be paid first, out of the personalty; second, out of lapsed devises and other intestate realty; third, out of specific devises. In other States devises abate with legacies, according to the class; that is, general devises will abate *pro rata* with general legacies, contributing ratably to the payment of testator's debts; and specific devises will abate *pro rata* with specific legacies."***

*Porter v. Howe, 173 Mass. 521; Vance's Est., 141 Pa. St. 201; 12 L. R. A. 227; Burke v. Stile, 65 N. H. 163; Richardson v. Hall, 124 Mass. 228; Chester County Hospital v. Hayden, 84 Md. 104.

**Farmer v. Spell, 11 Rich. Eq. 541; Morse v. Hayden, 82 Me. 227; Kelly v. Richardson, 100 Ala. 584.

***Page on Wills, Sec. 777.

9. Legacies and devises may be adeemed or satisfied when the testator in his life time gives to the legatee or devisee, the sum or thing which he has devised or bequeathed in his will.* This subject is known as "Ademption," by which is meant the destruction of a bequest or devise, either by the sale or destruction of the thing specifically bequeathed, or by the payment, satisfaction or advancement to the legatee by the testator in his life time.** A specific legacy, is said to be adeemed or destroyed, when the testator in his life time sells or conveys away the thing so bequeathed.*** While a general legacy is adeemed by the payment or advancement of the amount of such legacy in the life time of the testator.****

But a slight change in the form of an article specifically bequeathed, as renewed notes, and the like, do not adeem such legacy (Brady v. Brady, 78 Md. 461).

Where the testator by language in his will shows it to be his intention to charge legatees and devisees with sums advanced them in his life time and before the execution of the will such sums will be deducted from the shares given (McConomy's Estate, 170 Pa. St. 149).

Where testator gives property by will intending it as a discharge of a debt owing by him to the benefi-

*Hansborough v. Hooe, 12 Leigh. (Va.) 316; Am. Dec. 659; Tanton v. Keller, 61 Ill. App. 625.

**Page on Wills, Sec. 779.

***Brady v. Brady, 78 Md. 461; Hood v. Hayden, 82 Va. 588.

****Davis v. Close, 104 Ia. 264; Wheeler v. Wood, 104 Mich. 414.

ciary, it is called in law satisfaction.* If such intent is manifest the debt is satisfied if the gift is accepted, and will be presumed to be in satisfaction of such debt if the sum given is equal to or larger than the amount of the existing debt.**

But if the legacy is less than the amount of the debt, or postpones the payment longer than the original debt, or is in any way less advantageous to the creditor than the original debt, it will be presumed an independent gift and not a satisfaction of such debt.***

Where the testator, either in the same instrument or in a will and subsequent codicils, gives two or more bequests to the same person, the question arises whether they are to be considered as cumulative or substitutional; that is, whether all of such bequests are to be given to the legatee or the later bequest is to be considered as a substitute for the former. If the testator's intention is clear it will be followed in either case.**** When it is not clear which was intended by the testator, the following presumptions may be followed: Where the same property is given twice to the same person, it is unquestionably substitutional.***** While if two or more general legacies are given in different instruments, or if the second gift is different in amount

*Page on Wills, Sec. 795.

**Adams v. Adams, 55 N. J. Eq. 42; Contra, Lisle v. Tribble, 17 S. W. Rep. 742.

***Thompson v. Wilson, 82 Ill. App. 29; Stone v. Pennock, 31 Mo. App. 544.

****Holliday v. Holliday, 74 Md. 458; Wheeler's Est., 175 Pa. St. 23.

*****Suisse v. Lowther, 2 Hare. 424; Dickinson v. Overton, 57 N. J. Eq. 26.

or nature from the first, or where two legacies are payable at different times and places, it will be presumed that such gifts are cumulative.* The motive for making the gifts appearing to be the same may show that the second gift was intended as a substitute for the first.

10. A legacy or devise lapses, in the absence of a provision to the contrary, if the legatee or devisee dies before the testator, or before the legatee's or devisee's interest under the will can vest.**

A legacy is said to lapse when the beneficiary refuses to take, as where he elects to take under the statute in preference to the will (Hall v. Smith, 61 N. H. 144).

At common law a lapse always occurred when the beneficiary died before the testator, unless the express intention of the testator to the contrary appeared.*** So a gift to a private corporation lapsed by the dissolution of the corporation before the death of the testator.**** But modern statutes frequently provide that a

*Manifold's App. 126 Pa. St. 508; Adams v. Cole, Beav. 353; Thompson v. Teulon, 22 L. J. Ch. 243.

**"A lapsed legacy or devise is one which was originally valid, so that if testator had died immediately upon the execution of his will such devise or legacy would have taken effect, but which fails because the beneficiary in some way becomes incapable of taking under the will before the devise or legacy vests."—Page on Wills, Sec. 738; Hibler v. Hibler, 104 Mich. 274.

****In re* Reeves, L. R. 44 Ch. Div. 484; Bryson v. Holbrook, 159 Mass. 280; McGoveran's Est., 190 Pa. St. 375; Rivers v. Rivers, 36 S. Car. 302.

****Merrill v. Hayden, 86 Me. 133.

gift to one who is a lineal descendant of testator or to a child of testator; or that if such beneficiary leaves lineal descendants who are alive at testator's death, it shall not lapse; these statutes modify the common law of lapse where they apply.*

Void legacies and devises are those which fail by reason of some unperformed condition established by testator, or which fail by reason of being contrary to some positive rule of law, as the statute against perpetuities, and the like.**

Lapsed and void legacies and devises pass under a general residuary clause,*** except where they are themselves given by the residuary clause, in which case, and also when there is no general residuary clause, they pass as intestate property.****

In case of a devise to two or more as joint tenants, if the devise lapses as to one, the whole devise goes to the survivor; but if the devise be to them as tenants in common, the lapsed portion goes to the testator's heirs at law.

The testator may, however, direct the devolution of

---

*Morse v. Hayden, 82 Me. 227; Woolley v. Paxson, 46 O. S. 307; Logan v. Brunson, 56 S. C. 7; Wildberger v. Cheek, 94 Va. 517; Smith v. Smith, 141 N. Y. 29.

**State v. Holmes, 115 Mich. 456; Potter v. Couch, 141 U. S. 296.

***Crerar v. Williams, 44 Ill. App. 497; 21 L. R. A. 454; Dulany v. Middleton, 72 Md. 67; Davis v. Hutchings, 15 Ohio C. C. 174; 8 Ohio C. D. 52.

****Collins v. Collins, 126 Ind. 559; State v. Holmes, 115 Mich. 456; Powers v. Codwise, 172 Mass. 425; Booth v. Baptist Church, 126 N. Y. 215.

lapsed and void legacies and devises and if his wishes are not contrary to law, they will be followed (Hoope's Est., 185 Pa. St. 172).

11. A legacy or devise is vested when the gift is immediate and absolute, even though the time of payment or enjoyment may be postponed.* They are contingent when the gift is suspended to take effect only upon the happening of some future or contingent or uncertain event.** The law favors that construction which will make the legacy or devise a vested one.*** And a contingent legacy or devise will be held to vest at the earliest possible moment, that is, the instant that the contingency happens.****

12. It is a rule derived from the common law that the personal estate is the primary fund for the payment of legacies, unless it appears to be the intention of the testator as expressed by the will that a different rule should be followed.***** Under this rule real estate devised can not be sold for the payment of legacies, unless they are expressly or impliedly charged upon such land, and if the personalty is insufficient the lega-

---

*Lovass v. Olson, 92 Wis. 616; Benton v. Benton, 66 N. H. 169; Collier v. Grimsey, 36 O. S. 22; Wardwell v. Hale, 161 Mass. 396.

**Lapham v. Martin, 33 O. S. 99; Wilhelm v. Calder, 102 La. 342.

***Hills v. Barnard, 152 Mass. 67; 9 L. R. A. 211.

****Stephen's Est., 164 Pa. St. 209; Goldtree v. Thompson, 79 Cal. 613; Smith v. Jackman, 113 Mich. 192.

*****McQueen v. Lilly, 13 Mo. 9; Gieger v. Worth, 17 O. S. 564.

cies abate in the order as stated in the previous section.*

Legacies may be charged upon the real estate either by express words or by implication, if such an intention may be gleaned from the whole will.** So a mandatory charge or direction to support a named person, when added to a devise, will make such support a charge upon the realty.*** And where a general residuary clause passes both real and personal property, it is construed to show an intention upon the part of the testator to charge unpaid legacies upon such property, including the realty, when the personal property is insufficient.****

Where testator has left sufficient property to pay all of his debts he may, by express provision, or by a plain implication exonerate certain bequests of personalty from any liability to contribute to the payment of debts.*****

Sec. 1025. WHAT DEVISES AND BEQUESTS ARE VALID.—In order to make a valid devise or bequest, the thing given the beneficiary, and the nature

*Hogan v. Kavanaugh, 138 N. Y. 417; Wentworth v. Read, 166 Ill. 139.

**Dickerman v. Eldinger, 168 Pa. St. 240; Price v. Price, 52 N. J. Eq. 326; Clark v. Marlowe, 149 Ind. 141; Townsend v. Townsend, 25 O. S. 477.

***Bell v. Watkins, 104 Ga. 345; Tope v. Tope, 18 Ohio 520.

****Brooks v. Brooks, 65 Ill. App. 326; Newcomb's Will, 98 Ia. 175; Miller v. Cooch, 5 Del. Ch. 161; Root's Will, 81 Wis. 263.

*****Fargo v. Squires, 154 N. Y. 250; Patten v. Herring, 9 Tex. Cinn. App. 640; Calder v. Curry, 17 R. I. 610.

and the amount of the interest must be stated with reasonable certainty. If the thing given or the amount of the interest be uncertain, the gift will fail.* But a description defective in part will not invalidate; nor will the gift fail if the thing given can be ascertained from the description in the will aided by parol evidence of identification.**

1. Gifts to charitable uses which would be void for uncertainty, if given to individuals, are often sustained by the application of the doctrine of *"cy pres."* The doctrine of *cy pres* is a rule which grew up in the English courts of chancery by which when a gift to a charity made by a testator, becomes impossible to administer as directed in the will, the court applies the charitable gift *"cy pres,"* that is, "as near as" possible to the original intention of the testator, and a master in chancery is appointed to construct a plan to carry out such gifts.*** But this doctrine is not applied as fully in the American States as in England, owing to the different systems of government, the chancery powers of our courts being restrained by the division of governmental powers into three distinct branches or departments.****

*Heidenheimer v. Bauman, 84 Tex. 174; 31 Am. S. Rep. 29; McGovern v. McGovern, 75 Minn. 314.

**Gilmer v. Stone, 120 U. S. 586; Priest v. Lackey, 140 Ind. 399; Lowman v. Shinn, 162 Ill. 124; Schlottman v. Hoffman, 73 Miss. 188.

***Atty. General v. Briggs, 164 Mass. 561; 108 N. Y. 312; 2 Am. S. Rep. 420.

****Page on Wills, Sec. 655; McHugh v. McCole, 97 Miss. 166; 40 L. R. A. 724; McIntyre v. Zanesville, 15 O. S. 352.

2. Gifts for purposes which are unlawful, immoral, or opposed to public policy will not be valid.* Thus conditions in a gift which are in entire restraint of marriage are usually held void.**

3. A gift may be void, because it violates the rule against perpetuities. The subject of perpetuities is regulated by statute in many States which modify more or less the common law rule governing the subject. At common law it became settled that any interest or estate in land limited upon a condition precedent which would prevent the vesting of the fee for a longer period than a life or lives in being at the time of the creation of the estate, and twenty-one years and nine months thereafter, was a perpetuity and void. That is, unless the condition precedent was to be fulfilled within this period, it violated the rule against perpetuities.*** The rule does not apply to vested estates, but does apply to any interest in land other than a vested interest, as

---

*Maddox v. Maddox, 11 Gratt. (Va.) 804; Conrad v. Long, 33 Mich. 78.

***In re* Denfield, 156 Mass. 265; and see clause 8, in Sec. 1022.

***Gray on Perpetuities, Sec. 201; Leonard v. Haworth, 171 Mass. 496; Madison v. Larmon, 170 Ill. 65; Johnston's Est., 185 Pa. St. 179; in this case it is said that a perpetuity is a grant whereby the vesting of an estate or interest is unlawfully postponed; "and they are called perpetuities not because the grant as written would make them perpetual, but because they transgress the limits which the law has set in restraint of grants that tend to a perpetual suspense of the title or its vesting." Philadelphia v. Girard's Heirs, 45 Pa. St. 9; Phillips v. Herron, 55 O. S. 478.

contingent remainders, and executory devises, whether such interests are legal or equitable.*

The State statutes in some cases change the common law rule by providing that the estate can only be limited to the life of a person in being at the time of making the will or his immediate issue or descendants.** Other State statutes provide that the absolute power of alienation of a fee shall not be suspended for a longer period than two lives in being, and the period of minority, or twenty-one years, and the period of gestation.***

When the common law or statutory rule against perpetuities is violated, the devise is void and the property passes under the residuary clause if there is one, and if not it passes as intestate property. And this is so in cases where such a devise might or might not vest within the time limited by the statute.**** Thus a devise for a fixed period of time, as "twenty-five years" or "seventy-five years," without regard to lives in being, is void, though such time might be less than a life in being and twenty-one years.***** While devises to vest at the death of a person then living, or to the chil-

*Terrell v. Reeves, 103 Ala. 264; Carney v. Baptist Church, 126 N. Y. 215.

**Johnson v. Webber, 65 Conn. 504; Phillips v. Herron, 55 O. S. 478; Turley v. Turley, 11 O. S. 173.

***Estate of Cavalry, 119 Cal. 192; Tower's Est., 49 Minn. 371.

****State v. Holmes, 115 Mich. 456; Walkerly's Est., 108 Cal. 627; Lawrence v. Smith, 163 Ill. 149.

*****Johnston's Est., 185 Pa. St. 179; Walkerly's Est., 108 Cal. 627.

dren of such person as they come of age, or after twenty years from testator's death, are valid.*

Charitable devises, by which are meant, gifts to an indefinite class of persons from the general public, for the promotion of their well-being, are said not to be within the rules governing perpetuities, and such gifts may stand though in violation of the rule in the sense that the gift is not to become absolute within the term fixed by the rule.** But such a gift is void if it is not to vest within the time fixed by the rule against perpetuities.***

4. A condition can not be attached to an absolute and vested gift of property that it should be free from the claims of the creditors of the beneficiaries.**** But a gift of the income of real or personal property may be made that shall cease if the devisee becomes insolvent; and the property may be settled in trust for the benefit of a beneficiary in such a manner that he can not alienate it and that his creditors can not reach it.***** This constitutes an equitable estate and under the English law can only be created by providing that upon the

*Healy v. Healy, 70 Conn. 467; Stevenson v. Evans, 10 O. S. 307; Hughes v. Hughes, 91 Wis. 138; Potter v. Couch, 141 U. S. 296.

**Page on Wills, Sec. 641; Parker v. Churchill, 104 Ga. 122; Russell v. Allen, 107 U. S. 163.

***Crerar v. Williams, 145 Ill. 625; State v. Holmes, 115 Mich. 456; John's Will, 30 Ore. 494; 36 L. R. A. 242.

****Hobbs v. Smith, 15 O. S. 419.

*****Steibe v. Whitehead, 11 Ill. 247; Sears v. Choate, 146 Mass. 395; Beader's Est., 190 Pa. St. 606; Garland v. Garland, 87 Va. 759; 13 L. R. A. 212.

insolvency of the beneficiary and the attempt of creditors to reach such an estate, it shall pass to another.* This rule is followed in some States, while in others a provision that the estate shall not be transferred by the beneficiary during his life, and that it shall not be taken for his debts is sufficient.**

5. Where an estate is limited upon an unlawful condition, and the condition is precedent to the vesting of the estate, the legacy or devise fails. While if the condition is subsequent, the condition itself is ignored and the estate becomes absolute.

Sec. 1026. PROVISIONS CONCERNING A SUIT TO CONSTRUE A WILL.—The occasion and the power to construe a will arise only, as a rule, in an action brought for the purpose of enforcing the provisions of the will, and courts of law have no jurisdiction of such an action brought solely for the purpose of securing a construction; but where the will involves or creates a trust in real or personal property, an action may be brought in a court of equity for the purpose of securing a construction of such will.*** On the other hand, a court of equity has, in most States, no such jurisdiction if the will creates or involves a purely legal estate.****

*Shee v. Hale, 13 Ves. Jr. 404.

**Thornton v. Stanley, 55 O. S. 199; Sears v. Choate, 146 Mass. 395; Lampert v. Haydel, 96 Mo. 439; 2 L. R. A. 113.

***Bonnell v. Bonnell, 47 N. J. Eq. 540; Dill v. Wisner, 88 N. Y. 153.

****Minkler v. Simons, 172 Ill. 323; Edgar v. Edgar, 26 Ore.

In the absence of statutes providing a court, the State courts of general equity powers are the proper tribunals in which to bring an action to enforce the provisions of the will, and secure a construction of its terms.* The proper party to bring such a suit may be the executor, or administrator with the will annexed, or the beneficiary whose immediate interests are affected by the terms of the will.** Such a suit is not a contest of the validity of the will, and the will can not be reformed by the court as in the case of a deed or contract.*** The decree when rendered is binding upon all parties to the suit until attacked directly by appeal or error.****

Sec. 1027. WHEN PAROL EVIDENCE WILL BE ADMITTED TO AID IN CONSTRUCTION.—The following rules are applicable to the admission of parol evidence in suits to construe wills, though the same principles may be applicable in other cases:

1. The intention of the testator is to be gathered primarily from the will itself, and where his intention

---

65; Hollister v. Howe, 6 O. Dec. 157; 4 O. N. P. 168; Austin v. Bailey, 163 Mass. 270.

*Minkler v. Simons, 172 Ill. 323; Ladd v. Chass, 155 Mass. 417; Burton's Est., 93 Cal. 459.

**_In re_ Battchelder, 147 Mass. 465; Davis v. Hutchings, 15 O. C. C. 174; Stevens v. Dewey, 55 N. J. Eq. 322; Read v. Williams, 125 N. Y. 560.

***Mason v. Roll, 130 Ind. 26; Onderdonk v. Onderdonk, 127 N. Y. 196; Eckford v. Eckford, 91 Ia. 54.

****Coglan v. Dana, 173 Mass. 421; Stoff v. McGinn, 178 Ill. 46; Hawthorn v. Beckwith, 89 Va. 786.

is there clearly expressed, it can not be contradicted, altered or extended by any use of parol evidence.*

2. The names of persons or amounts omitted from the will can not be supplied by showing by parol evidence whom or how much the testator intended.**

3. Parol evidence, is not admissible to change rules of construction.

4. Parol evidence may be received to aid in deciphering the handwriting when obscure, or to translate the language when that is necessary.

5. Parol evidence may be used to identify the person or thing described in the will, when such identification is necessary to apply names or descriptions contained in the will.***

6. Parol evidence may be resorted to, to clear up a latent ambiguity.****

In case of a patent ambiguity it may be admitted for the purpose of showing the facts and circumstances surrounding the testator, and of putting the court as nearly as possible in the testator's position.*****

In all these cases where there is an ambiguity in the

---

*Sturgis v. Work, 122 Ind. 134; Bingel v. Volz, 142 Ill. 214; 16 L. R. A. 321.

**Heidenheimer v. Bowman, 84 Tex. 174; 31 Am. St. Rep. 29.

***Ikard v. Thompson, 81 Tex. 285; Daugherty v. Rodgers, 119 Ind. 254.

****_In re_ Ashton, P. 83; Tilley v. Ellis, 119 N. C. 233; Gordon v. Burris, 141 Mo. 602.

*****Smith v. Bell, 6 Pet. 68; Nichols v. Boswell, 103 Mo. 151; Masters v. Masters, 1 P. Williams 425; Chappell v. Society, 3 Ind. App. 356.

will, parol evidence of testator's circumstances, surroundings, family and general situation may be received for the purpose of obtaining such light as these facts may throw upon his intentions to "enable the court to place itself in his situation, to see things as he saw them, and to apply his language as he understood and intended it" (Pruden v. Pruden, 14 O. S. 251; Whitcomb v. Rodman, 156 Ill. 116; 28 L. R. A. 149.)

PART II.

CHAPTER I.

THE LAW OF DESCENT AND DISTRIBUTION.

Sec. 1028. DESCENT AND DISTRIBUTION PART OF THE LAW OF SUCCESSION AFTER DEATH.—The law of Descent and Distribution, as we have seen (Sec. 922), is a part of the general subject of the law of succession after death, the statutes of Descent and Distribution being the legal distribution of a decendent's estate where he has failed to make a distribution for himself by will, that is, in effect, it is the will which the law makes for a man as distinguished from the will of the owner.

This "Will of Law" is divided into—1. Substantive or declaratory law, and 2, adjective law, or the machinery of the law, as pleading, practice, evidence, etc., by which the substantive law is carried into effect. The statutes of descent and distribution form the declaratory law under this subject, and "Administration" includes the machinery of the law to carry the substantive provisions into effect.

Sec. 1029. MEANING OF THE WORDS "DESCENT" AND "DISTRIBUTION."—Where the owner of property has left no will at his death, or has left property which his will does not dispose of, the

law determines the disposition which shall be made of it. The will of the law is declared by statutes called usually, when referring to real property, "Statutes of Descent," and when referring to personal property, "Statutes of Distribution." While the whole subject is styled the law of "Descent and Distribution."

Sec. 1030. NATURE OF THE RIGHT TO TAKE PROPERTY BY STATUTES OF DESCENT AND DISTRIBUTION.—The right to take property by descent or distribution is not an absolute one, but depends entirely on the statutes. These statutes may be changed at any time before the title to property has become vested under them. And all mere expectant rights and interests may be cut off by such change in the statutes, but not vested rights or interests.

These statutes sometimes provide, that the same person shall take both the real and personal estate of the intestate, but usually a distinction is made. The law in force at the time of the intestate's death is the law which controls the division of the property. This excludes prior statutes and subsequent ones.

Sec. 1031. WHAT LAW GOVERNS DESCENT AND DISTRIBUTION?—The descent of real property is governed by the law of the place where the land is situated, technically called the *lex rei sitae.** Personal property is distributed in accordance with the

*Jones v. Robinson, 17 O. S. 171; Jennings v. Jennings, 21 O. S. 56.

law of the intestate's domicile at the time of his death.

A person's domicile is where he has his true, fixed and permanent home and principal establishment to which when he is absent, it is his intention to return.* Every person is deemed in law to have a domicile somewhere.** And by the American rule one's original domicile continues until a new one is gained.*** Mere absence from one's fixed home though long continued does not work a change of domicile so long as there is an intention to return, but a temporary absence may become general and unlimited, and will work a change of domicile.****

The domicile of a minor child is prima facie that of the parent, or the father.***** The domicile of a married woman is prima facie that of her husband,****** but she may gain a separate residence for the purpose of a suit with her husband.*******

---

*Anderson v. Anderson, 42 Vt. 250; Horne v. Horne, 9 Ired. L. 99; Daniel v. Sullivan, 46 Ga. 277.

**Abington v. No. Bridgewater, 23 Pick. (Mass.) 170; Crawford v. Wilson, 4 Barb. (N. Y.) 504.

***Abington v. No. Bridgewater, 23 Pick. 170; Littlefield v. Brooks, 50 Me. 575; Clark v. Likens, 26 N. J. L. 207.

****Wilbraham v. Ludlow, 99 Mass. 587; Wayne v. Greene, 21 Me. 357; McKowen v. McGuire, 15 La. An. 637; Henrietta v. Oxford, 2 O. S. 32.

*****Hart v. Limbsey, 17 N. H. 235; Warren v. Hofer, 12 Ind. 167.

******Davis v. Davis, 30 Ill. 186; Green v. Green, 11 Pick. 410.

*******Green v. Windham, 13 Me. 227.

Sec. 1032. THE PROVISIONS OF THE STATUTES OF DESCENT.—The rules of descent, as they prevailed at common law, have been almost entirely abrogated and amended by the state statutes in this country. At common law there were six canons of descent, which may be found in the various works on real property.* The statutes in the several states vary to some extent and must be consulted in each case to determine the exact order of descent, but certain general provisions are common to all and these we will now discuss briefly.

1. Quite universally, the children of the deceased, if any, inherit his real estate in equal shares. The descendants of any deceased child taking by right of representation the same share that the deceased child would have taken if living, that is, technically speaking the rule of descent is *per stirpes.***

2. Adopted children will take as heirs of their adopted parents, where that is the effect of the statute authorizing the adoption. They may also take as heirs of their natural parents unless excluded. But their adopted parents can not take as their heirs.***

3. Children born after the death of the intestate, take as though born in his life time.****

---

*See Williams on Real Property and also a later volume of The Home Law School Series, covering the subject of Real Property; also see Abbott's Law Dictionary, "Descent."

**Rev. Stat. of Ohio, Secs. 4158-4159.

***Rev. Stat. of Ohio, Sec. 3140; Upson Admr. v. Noble, 35 O. S. 655.

****Rev. Stat. of Ohio, Sec. 4179.

4. Illegitimate children, had at common law no inheritable blood, and could inherit neither from their father, mother nor any one else. In this country they are almost universally permitted to inherit from their mother, and the statutes in most states provide for their being legitimated by the subsequent marriage of their parents, or by acknowledgment of them by their father.*

5. Half brothers and sisters inherit alike as children of their common parent. (Rev. Stat. of Ohio, Secs. 4158-4159; Stemble v. Martin, 50 O. S. 495.) Living children not provided for in the will usually take as heirs where their omission was unintentional. And children born after the making of the will, and those born after the testator's death, if not provided for in the will, usually take as heirs. Though the statutes in some states permit their exclusion where the will itself shows a clear intention to exclude them.

The word "child" or "children," as used in these statutes, does not include grandchildren unless the statutes show that the words were used so as to include all of the descendants of the intestate.

5. At the common law, a surviving husband or wife was not an heir of the other. But by statutes in most of the states they take in the absence either of direct descendants or next of kin.**

---

*Rev. Stat. of Ohio, Secs. 4174-4175; Gibson v. McNeely, 11 O. S. 131; Little v. Lake, 8 Ohio, 289.

**Rev. Stat. of Ohio, Secs. 4158-4159-4160; Lathrop v. Young, 25 O. S. 451.

In some states they take with the children; they have also in most states certain interests in the real estate of the deceased given by statute, as "dower," "courtesy," or their equivalents.

6. It was the rule at common law that an estate could not lineally ascend, but this rule is abrogated in nearly all of the states, and provision is made by the statutes for inheritance by the father or mother, or both, not only in cases where the intestate left no lineal descendants, but also where he has left lineal descendants.

Brothers and sisters of the intestate with their descendants are often given priority over parents as heirs. Brothers and sisters of the half-blood of the intestate share with those of the whole-blood in many states; though in others, a discrimination is made, such as giving those of the half-blood only a half share, or excluding them altogether, if the property was originally derived from an ancestor not of their ancestral blood.*

7. In the absence of descendants, father, mother, brothers, sisters, husband or wife,—the statutes usually provide for inheritance by the next of kin. The term "next of kin" means those most nearly related by blood. And where this term is used, those more nearly related therefore exclude those more remotely related.** A husband or wife is not one of the next of kin of the other.

---

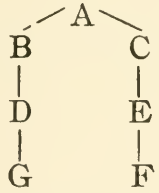
*See Rev. Stat. of Ohio, Secs. 4158-4159.

**Patterson v. Lampson, 45 O. S. 77; Clayton v. Drake, 17 O. S. 367.

In ascertaining the "next of kin" to the intestate, the degrees of consanguinity are to be computed according to the rule of the civil law.*

8. Consanguinity, or kindred, is defined by Blackstone as "the connection or relation of persons descended from the same stock or common ancestor" (2 Com. 202) Consanguinity is of two kinds:—1, Lineal; 2, Collateral.

Lineal consanguinity is that existing between persons of whom one is descended in a direct line from the other. While collateral kindred are descended from the same stock or ancestor, but not directly one from the other.**



Thus in the illustration a-c-e-f, and a-b-d-g, are lineally related or descended, while c-b-, c-d, c-g, e-b, etc., are collaterally related.

*Clayton v. Drake, 17 O. S. 367.

**"Consanguinity is spoken of as lineal or collateral. It is lineal between two persons one of whom is descended from the other; as between a given person, usually called in this connection, the *propositus*, and his son or grandson, his father or grandfather. It is collateral where the two persons are descended from some common ancestor, but neither of them from the other; thus the collateral relatives of the *propositus* are his brother or sister, his nephew, his uncle, cousin, etc." —Abbott's Law Dictionary, "Consanguinity," 2 Bl. Com. 203.

In computing the degrees of relationship or consanguinity, each generation counts as one degree. In estimating the degrees of lineal consanguinity the civil, the canon, and the common law follows the same plan, that is, each generation is one degree. Thus in the illustration (f) is lineally three degrees from (a).

In estimating collateral consanguinity, the common law and canon law began with the common ancestor and counted down to the claimant, and in whatever degree the claimant is distant from the common ancestor that is the degree in which he is related to the intestate. The civil law counted upward from the intestate to the common ancestor and then downward from him to the person in question, reckoning one degree for each step or generation and the total number of steps indicated the degree of the relationship.*

Most of the states have adopted the rule of the civil law in computing the degrees of consanguinity.**

9. At the common law an alien could not take real property by descent, but this rule is quite generally changed by the statutes of the several states. (Rev. Stat. of Ohio, Sec. 4173.)

10. Where there is no one who is entitled to take as heir or next of kin, of the intestate under the statute, the estate escheats to the state. (Rev. Stat. of Ohio, Sec. 4164.)

11. A person who murders the intestate, cannot acquire his property by inheritance, but such act does

*2 Bl. Com. 206, 207n.
**Cooley's Bl. Com. 11, 207n.

not destroy the inheritable quality of his blood (Deen v. Millican, 6 Ohio C. C. 357).

12. Upon the death of the intestate, his real property is usually deemed to vest at once in his heirs by operation of law, without any order or decree of court, though it may be subject to contribute to the payment of debts in case of an insufficiency of personal property.*

Sec. 1033. PROVISIONS OF THE STATUTES OF DISTRIBUTION.—Unlike the real estate, the personal property of the intestate, does not descend at once to the heirs. The title to the personalty is deemed to vest in trust in the personal representative, and until the representative has qualified, the title to it remains in abeyance, but upon his qualification, his title for many purposes relates back to the time of the death of the intestate.

After the payment of debts,—and if there be a will, —of the general and specific legacies, the residue of the personal estate is to be disposed of as follows: If there be a will, with a residuary clause, such residuary clause will control the disposition, but if there be no will, or if the will does not dispose of all the personal estate, then the part undisposed of, is to be distributed according to the statute of distribution prevailing in the jurisdiction at the time of the owner's death.

1. The persons entitled to take under the statutes

*See Ante, Sec. 1024, Clause 8; Overturf v. Dugan, 29 O. S. 230.

of descent and those entitled to take under the statutes of distribution, are often, but not necessarily the same. And under most of such statutes, the surviving husband or wife is given a greater share in the personal than in the real estate.*

2. The distribution of the personalty is usually postponed until the final settlement of the estate. But in many states, provision is made for an earlier distribution, in whole or in part, if refunding bonds are given by the distributees to provide for the return of the property distributed, or its value, in case it becomes necessary to pay demands upon it.

In most cases, and regularly, a decree of distribution is made by the proper court, which decree determines the persons entitled to share and the respective proportions which each is to take. But the personal representative often takes the risk of distributing the personalty without such a decree.

3. The right of a distributee to his share is usually deemed to be vested at the time of the death of the intestate, though his right to possession, the amount of his share, and the specific property to be assigned to him are not fixed until the decree of distribution.

4. If a distributee dies, pending distribution, his share will be payable to his personal representatives. And a distributee may assign his interest pending distribution, in which case his share will be paid to his assignee.

---

*See Rev. Stat. of Ohio, Secs. 4168-4176.

5. Debts due from a distributee to the deceased, will be deducted from his share, and so will advancements, made to him by the deceased in his life time.*

6. The distributee may maintain an action against the personal representative of the intestate to recover his distributive share, after a decree of distribution has been made and is uncomplied with. But in many states a summary remedy is provided by statute and may be used in such cases to compel the personal representative to distribute the estate.

---

*Rev. Stat. of Ohio, Secs. 4169-4172; Dittoe v. Cluney, 22 O. S. 436; Swihart v. Shaum, 24 O. S. 432; Stableton v. Ellison, 21 O. S. 527; Parsons v. Parsons, 52 O. S. 476.

CHAPTER II.

ADMINISTRATION.

Sec. 1034. SCOPE OF THIS CHAPTER.—The will of law, as comprised in the statutes of descent and distribution, is not self executing but requires to be carried into effect by means of the established judicial machinery. The method of setting this machinery to work in a particular case and the modes of operation until the estate is entirely settled is all comprised under the word "Administration."

In order that the administration of an estate may go on, the proper court must acquire proper jurisdiction by proper proceedings. The court having jurisdiction of the estate of an intestate is usually the court which would have had jurisdiction if he had died testate. That is, the court of probate jurisdiction for the county or district in which the deceased was domiciled at the time of his death. If he had no fixed residence at the time of his death, then the court of the county in which he died may take jurisdiction. While if the intestate died abroad, the court of any county in which he had property may administer, though there cannot be more than one grant of administration in the same state. Of several courts in the same state which might acquire jurisdiction, that one will be allowed exclusive control, which first acts in the matter. But in order that any court may acquire jurisdiction

of a non-resident it is essential that he should have left property within its territory.

1. In general, in order that any court may acquire jurisdiction, it is essential that proof be made of the death of the alleged intestate. When a person has been absent from his established home, and unheard of by his friends and relatives for a period of seven years, it is presumed that he is dead, and the court may proceed upon that presumption. The same presumption may arise in less than seven years where the disappearance was accompanied by special circumstances, which of themselves raise a presumption of death.*

Where several lives are lost in the same disaster there is no presumption from age, or sex that either survived the other, but the fact of survivorship must be proved by the party asserting it. The presumption in any of these cases is only a prima facie one, and may be rebutted by proof that the party is not dead.

If the supposed intestate is not in fact dead, the majority of cases hold that all proceedings to settle his estate are void, but a few states hold that the proceedings will be sustained so far as may be necessary to protect the rights of innocent parties. In some of the states the matter has been regulated by statutes. These statutes usually declare the proceeding void, but they also usually protect the rights of

*Rosenthal v. Moyhugh, 33 O. St. 155.

those who have acquired interests under the proceedings.*

2. The English doctrine of civil death has not been adopted in this country; but in a few states, as in Kansas, Maine and Missouri, the estates of convicts sentenced to imprisonment are to be settled as though they were dead.

3. The proper court is usually set in motion by a petition, from some person interested in the estate, setting forth the fact and nature of his interest; the fact of the death of the intestate; that he died intestate; that he left property within the jurisdiction of the court to be administered, stating its amounts and the names and relationship of the persons who may be entitled to share in it. This petition is usually to be verified by the oath of the petitioner.

4. Upon filing the petition an order of hearing is made, and a day set for such hearing, notice of which facts must be given to all parties interested, either by actual notice or by publication. Upon the hearing formal proofs of the allegations of the petition are made and then administration is granted.

5. A person not interested in the estate cannot set the court in motion by a petition for the appointment of an administrator. But an interest as a creditor is sufficient. The statutes usually require that notice of the application shall be given to all parties who might

*Scott v. McNeal, 154 U. S. 34; Thomas v. The People, 107 Ill. 517; Bolton v. Schriever, 18 L. R. A. 242; 135 N. Y. 65. See Day v. Floyd, 130 Mass. 488.

be entitled to administer, and often to all who are beneficially interested in the estate. A failure to give the notice required by the statute will usually be sufficient cause for revoking letters of administration given without it. The persons cited to appear on the hearing, or any person beneficially interested in the estate, may appear and contest the grant of administration to any particular applicant.

The granting of administration is a proceeding *in rem,* the same as the probating of a will, to which there are no formal parties. And an order made by the proper court, upon such notice as the statutes require, is usually binding upon all the world.

6. Statutes in many of the states prescribe the time within which administration shall be applied for, and administration granted after such time is usually held void. In some states no limitation is prescribed and administration may be had within a reasonable time. In a few states the amount of property which shall justify administration is prescribed by statute, but in most states no such provision is found, though there must usually be some assets to justify the grant of administration.

Sec. 1035. WHO MAY CLAIM APPOINTMENT AS ADMINISTRATOR?—The person who is entitled to be appointed administrator, is usually determined by the provisions of the state statutes.

At the common law the surviving husband had the right to administer upon the estate of his deceased

wife, and the surviving wife had usually the same right either alone, or in connection with the next of kin, to administer upon the estate of her deceased husband.

This rule is preserved by the statutes in most of the states, and if there be no husband or wife surviving, then the right of administration usually passes to the next of kin. If no kindred exist competent or willing to act, then a creditor or a stranger may be appointed.*

The right of the widow to administer the estate of her husband is not an absolute one, and may be forfeited by her misconduct. She is ususally held disqualified where by an antenuptial settlement she has waived all rights in her husband's personal property. The right of the husband at common law might be lost for the same reason. And the right of either is dependent upon the existence of a valid marriage at the time of the death, so that if the marriage was void, or has been dissolved by divorce, the right of administering fails.

After the right of the surviving husband or wife to administer, usually comes the right of the next of kin. Who they are, and in what degree related, is to be determined by the rules already given in the previous chapter. Where there are several, standing in the same degree of relationship, the court usually has power to select the most suitable to administer. In making this

*Rev. Stat. of Ohio, Sec. 6005.

selection, certain rules usually govern. Thus a sole administration is preferred to a joint one; males are preferred to females; residents to non-residents; unmarried women to married women; relatives of the whole blood to those of the half blood; those more interested in the estate to those less interested, and the like.

After the next of kin, the creditors have usually the right to administer. In selecting an administrator from the creditors, the statutes often give those with the largest claims the preference, but sometimes those first applying have the preference. In many of the states those having the right to administer, and who do not desire to do so in person, may nominate the administrator.

The person entitled to be appointed administrator or executor may renounce the right, and then, in case of a sole executor, an administrator with the will annexed must be appointed. While in the case of an intestate estate, the right to administer passes to the person next entitled to it.

Contracts to renounce the right to appointment as administrator are usually regarded as opposed to public policy and void, though in a few cases such contracts have been sustained.

Sec. 1036. QUALIFICATION FOR THE OFFICE OF ADMINISTRATOR.—The person entitled to administration being determined, and being ready and willing to accept the trust, he must qualify for the

office. This qualification consists in taking the oath and giving the bond required by the statute, and in an amount fixed by the court according to the value of the estate to be administered. The form of the bond is usually prescribed by statute, but in substance it is conditioned, for the faithful discharge of the duties of the office according to law. The amount of the penalty of the bond is generally left to be fixed by the court, and is ordinarily fixed at double the amount of the personal property.

Sureties are required in such numbers as the statutes specify. In determining the sufficiency of the execution and form of the bond, the courts give it a liberal construction for the protection of those in whose behalf it was required.

In many of the states an executor is not required to give a bond, if the terms of the will exempt him from the necessity. But in other states the statutory requirement of a bond can not be thus waived.

If for any reason, additional bonds, new sureties, or increased penalties, become necessary for protecting the estate while in the hands of the administrator, or executor, the court is authorized to require them to be furnished. The office cannot be regarded as properly filled until the qualifying bond has been duly given, but a grant of administration without it, would ordinarily be voidable only, and not absolutely void.

Sec. 1037. HOW THE APPOINTMENT IS EVIDENCED.—Upon the due qualification of the of-

ficer, the letters of administration will be granted to him, if an administrator; and letters testamentary, if an executor.

Such letters granted by a court having jurisdiction for that purpose are, while unrevoked, conclusive evidence of the authority of such officer, and cannot be collaterally impeached or attacked, though they may be revoked, by the proper court, in a direct proceeding for that purpose, or upon appeal from the order awarding them.

A grant by a court without jurisdiction, is void, and confers no right upon any one. Letters granted without authority may be recalled by the court. And by statute in most states, the court is authorized to remove an executor or administrator for certain causes therein specified.

Usually the statutes provide that the executor or administrator may be permitted to resign with the consent of the court, and upon rendering a correct account, but at the common law, such an officer could not resign.

The letters thus granted, do not of themselves, constitute the authority of the officer. They are the evidence of his authority but not the only evidence. As evidence of his appointment, and rights as such, they are, when granted by a court of competent jurisdiction, conclusive. But they are not admissible as proof of the death of the intestate, in actions between strangers.

Sec. 1038. WHAT MAY BE DONE BY THE OFFICER BEFORE THE LETTERS ARE ISSUED?—It was the theory of the common law that the executor derived his authority from the will itself and that his title therefore vested at the testator's death. An administrator, on the contrary, derived his title from the grant of administration. In most of the states the common law rule as to executors is repudiated and the executor, like the administrator, derives his title and power from the law, or the grant of authority by the proper tribunal. But in either case, for the protection of property and the enforcement of rights, the appointment of the executor or administrator, when made, relates back to the time of the death of decedent. Before the grant of letters, the person nominated as executor, or the person entitled to administration, has no authority further than is necessary to preserve and protect the property until the appointment can be made. But if letters are subsequently granted to such person, acts done by him before the grant which would have been lawful had he then been the legal officer, will be deemed ratified.

A person who without authority intermeddles with the estate of the decedent and assumes to act as executor or administrator, was, at common law, termed an executor *de son tort,* that is an executor "of his own wrong." Any act evincing a legal control over the goods of the estate, would, if unexplained, make the person liable as such an executor. But mere acts of

kindness or charity toward the property or estate of the decedent would not do so. An executor *de son tort* is said to have all the liabilities but none of the rights of a lawful representative. He is liable to be sued by the rightful representative; by a creditor or a legatee; but he will usually be allowed credit for those acts which the lawful representative would have been obliged to perform.

If such an executor afterwards receives an official appointment, such of his acts as would have been valid, if he had been the rightful officer, will be ratified. The rules just mentioned relating to this class of executors have been abrogated by statute in many of the states, though in several states they still remain in force.

Sec. 1039. THE RIGHTS, DUTIES AND LIABILITIES OF EXECUTORS AND ADMINISTRATORS.—The first duty of the officer is to gather together and take into his possession such of the property of the deceased as passes to the representative. This property is termed the assets of the estate.

1. The real estate of the deceased passes usually to the heir or devisee upon the death of the decedent, and the personal representative has no interest in it. In a number of states by statute the representative is entitled to the possession of the real estate during the period of administration for the purpose of settling the estate, but even under these statutes the real estate is usually deemed to descend at once to the heir, who

may exercise all the rights of ownership over it, until the personal representative sees fit to exercise his possessory rights under the statute.

2. Except in such states as provide that the officer may possess himself of the real estate during administration, the personal representative is not bound or entitled to take possession of or to care for the real estate, unless it becomes necessary for the purpose of selling it to pay debts or legacies. If the personal estate is insufficient for this purpose, then the real estate becomes assets, by statute in all of the states.*

3. The testator may, by his will, confer upon the representative the power to sell, mortgage or otherwise deal with real estate, and powers so conferred are construed to be in addition to those conferred by the statutes.

Sales under such powers usually require no license or decree from the court. In all other cases, than those in which such a power exists, the representative has no authority to sell the real estate, even for the payment of debts, without the order or license of the probate court. Where the testator confers a power to sell upon several, all of these persons must unite in its execution, and if one dies or refuses to do so, the power fails. Though this latter rule is changed by statute in some states.**

4. Discretionary powers conferred upon an executor

*Elstner v. Fife, 32 O. S. 358; Douglass v. Massie, 16 Ohio 271; Ramsdall v. Craighill, 9 Ohio 198.

**Rev. Stat. of Ohio, Sec. 5980.

by will, are usually personal in their nature and do not follow the office into the hands of his successor. That is, where A has been appointed executor by will with discretionary power nominated in the will, and he dies, his successor, B, will not have the powers which were conferred upon A.

5. Where such a power is conferred by the testator, and the object can not be accomplished or is otherwise accomplished, the power ceases. If the testator directs the nature of the property to be changed, as to convert real property into personal property or vice versa, the courts of equity will regard that as done which is so directed to be done. And the property so directed to be changed will be treated as though the change had actually taken place. This equitable rule is known as the Doctrine of Conversion, and applies wherever the testator has made a positive and unqualified direction to the executors or representatives to change property.*

6. Chattels real, go to the personal representative after the death of the tenant. By chattels real, are meant interests in land less than free-holds, as estates for years, estates from year to year, and estates for the life of a third person *(per autre vie)* after the death of the testator.

7. The interest of a mortgagee,—or mortgaged real estate,—is personal property and goes to the representative.

---

*Page on Wills, Sec. 699; Ebey v. Adams, 135 Ill. 80; 10 L. R. A. 162; Johnson v. Conover, 54 N. J. Eq. 333; Collier v. Grimesey, 36 O. St. 17; Klotz's Est., 190 Pa. St. 152.

If the representative buy the property so mortgaged, in a foreclosure suit on the mortgage, the property is still regarded as personalty and as an asset. The mortgaged property itself or the equity of redemption, prior to a foreclosure, is regarded as real estate, and on the death of the mortgagor goes to his heirs.

Sec. 1040. SAME SUBJECT — PERSONAL PROPERTY AS ASSETS.—The chief portion of the representative's estate is the personal property of the deceased. This is of two kinds: 1. Personal property in possession. 2. Rights in action, also called choses in action.

1. Personal property in possession is of three kinds: (a), Chattels animate. (b), Chattels vegetable. (c), Chattels inanimate.

Chattels animate, include all domestic animals and animals originally wild where they have been domesticated. Chattels animate pass to the representative upon the death of the decedent.

Chattels vegetable, include trees, grass, and fruit which naturally include all kinds of growing things, as crops, trees, grass, fruit and the like. Trees, grass and fruit, while still annexed to the soil and unsevered, are considered a part of the realty, and pass to the heir. But if severed from the soil during the life of the owner, they become personal property and pass to the representative upon the death of the decedent. Crops raised annually, of the kind known as *fructus in-*

dustriales or emblements go to the representative as against the heir, but not as against the devisee.

All other personal property of the deceased may be classed as chattels inanimate and pass to the representative on the death of the decedent.

As between the representative and the heir, the rule respecting fixtures is quite strictly construed in favor of the heir, and even more strictly in favor of the devisee in conflicts between the devisee and the representative.

As between the owner of land and the representative of a deceased tenant, the law is liberal in allowing the representative to remove trade fixtures, and usually agricultural and domestic fixtures.

2. Choses, or rights in action of the deceased go to the representative. These include his stocks, bonds, policies of insurance made payable to him or his representative, rents accruing but not collected before his death, dividends and interest falling due on specific legacies before his death, deposits in bank in the name of the deceased, interests in patents and copyrights; and generally, all debts, demands, evidences of indebtedness and obligations due or owing to the deceased at the time of his death, whether absolute or contingent.

3. In order that personal estate shall constitute assets in the hands of the representative, it is essential that the deceased should have been the owner of it at the time of his death, though his possession of it at that time is not essential.

4. Causes of action upon contracts made by the deceased, upon which he might have sued if he had lived, survived his death at the common law and became assets in the hands of the representative, who might sue upon them after the death of the deceased. An exception to this rule exists in the case of contracts, founded upon purely personal consideration, such as an agreement to marry, an agreement to perform personal services, and the like, which did not survive.

If the personal chattels of the deceased have been taken away in his life time, the representative may maintain an action to recover them, or their value.

5. By the common law, actions for the recovery of damages, for torts or injuries to the person or property of the deceased, were said to die with the person injured, or with the person committing the tort, and did not survive to the personal representative.

This rule has been changed by statute in most of the states, and actions for assault and battery, slander, libel, false imprisonment, or other wrongs to the person, now usually survive, as well as actions for the recovery of personal property taken, or its value.

6. At the common law, no action could be brought to recover damages for wrongfully causing the death of a person, but this rule has been changed in most of the states by statutes which give a right of action usually to the representative, though the damages recovered are usually declared to be for the benefit of

certain persons named in the statutes and are therefore not assets.

7. Actions for wrongs done to the freehold during the life of the deceased did not survive at the common law, but this rule is also changed by statute in many states.

8. As the real estate goes to the heir, covenants running with the land go to the heir also, but when the breach of such a covenant has occurred in the life time of the deceased and its ultimate damage has thus resulted, the personal representative may recover for such breach. He may also sue upon collateral covenants whose breach during the life time of the deceased resulted in an injury to his personal estate.

9. Property conveyed away by the decedent in fraud of his creditors is assets and the personal representative may and should sue to recover such property.

10. Interests in the personal property to which the decedent's husband or wife is by law entitled, and the personal property which is by law to be set aside for the support of the widow and her minor children, are not assets.

11. Interests of the deceased in a partnership is assets only after the affairs of the partnership have been finally adjusted and settled. As the surviving partner takes the entire legal title for the purpose of winding up the affairs of the firm.

12. Upon the death of one joint tenant, his interest

in either real or personal property held in joint tenancy passes to the survivor, and is not assets. But interests held in common are assets.

13. At common law, debts due from the executor to the deceased, were deemed discharged by his appointment. But now in the various states such debts are deemed assets.

14. Property situated in another jurisdiction than that within which the officer is appointed is not assets for which he is accountable, unless by virtue of the power granted to him when appointed he is able to reduce such foreign property to his possession.

15. Debts due by simple contracts are deemed assets, in the jurisdiction where the debtor resides; debts due by specialty are assets where the securities are at the time of the owner's death; debts evidenced by judgments are assets where the judgment is recorded; and debts on leases are assets where the land lies.

16. The income or increase and profits of assets are assets. And property lost by the negligence of the representative is assets for which he may be held accountable.

Sec. 1041. SAME SUBJECT—THE INVENTORY AND APPRAISERS.—Having taken upon himself the administration of the estate, the officer is required by statute in all the states, to make and file within a time prescribed by law, a complete inventory of the estate, setting forth in detail all the property within his possession or knowledge and capable of re-

covery by him, which is, or may be, assets of the estate.

Assets coming to his knowledge or possession are subsequently to be added or included in the supplementary inventory. In most of the states, upon the completion of the inventory, the property described is required to be appraised by appraisers, usually three in number and appointed by the court, who are required to set down the true value of each article.

A failure to make or return the inventory as required by law, is a breach of the officer's bond, and the statutes usually provide summary remedies for securing a compliance with the law and for obtaining property concealed or withheld by the officer.

The inventory and appraisal are not conclusive either for or against the officer, but they are *prima facie* evidence of the amount of assets and of their value.

Sec. 1042. SAME SUBJECT—CONCERNING THE COLLECTION AND POSSESSION OF ASSETS.—It is the right and duty of the officer to collect and take into his possession all the assets belonging to the estate which come to his knowledge. And his right during the settlement of the estate is superior to that of the heir or legatee.

1. He is bound to exercise good faith and reasonable prudence and diligence in commencing and prosecuting all actions which may be necessary to enable him to acquire possession of the property or to collect the debts due the decedent.

2. He is not bound to attempt the collection of bad debts, and is not liable for their non-collection. But for debts or property lost by his negligence, he is liable.

3. Where the claim is a doubtful one, he may, and should, ask for indemnity or security from those urging its collection, but he must be prepared to show that it was not lost by his negligence.

4. The representative is not liable for a loss resulting from a mistake in law by which a debt remains uncollected, if he has acted in good faith and upon the advice of reputable counsel.

5. He is to use reasonable care and prudence to sue upon and enforce those rights of action which survive to him and constitute part of the assets of the estate. And he must also prosecute and defend all actions commenced in the life time of the deceased which survive, as well as seek to enforce those contracts and obligations which have been made with him since the death of the deceased.

6. In suing upon contracts made, or wrongs committed during the life time of the deceased, the representative sues in his official capacity, but as to contracts made or wrongs done since the death of the deceased, he may usually sue either in his own name or in his official capacity, at his option.

7. To entitle the representative to sue upon the contracts of the deceased, it is not necessary that the contracts should refer to the representative, as the right

will exist even though the contracts purport to be made with the deceased and his heirs, or next of kin.

8. At common law, the representative might compromise or arbitrate a disputed claim or cause of action if he could show that his act was for the best interests of the estate. But if the arbitrators awarded less than might have been recovered by suit, or if he lost by such a compromise, the representative might be called upon to make up the loss. In most of the states, statutes exist by which the representative, with the consent of the court, may make a compromise without this personal liability.

9. In collecting the assets the representative has the right to enter upon the lands of the deceased to gather the crops or secure other personal property belonging to the assets of deceased.

Sec. 1043. SAME SUBJECT—CONCERNING THE MANAGEMENT OF THE ESTATE. — The statutes require that the officer in dealing with the assets of the estates shall act in good faith, and shall exercise that degree of care, skill and diligence which men ordinarily bestow in the management of their own affairs. If he fails in this respect and loss results by reason of his failure, he will be personally liable for the amount of the loss.

1. He should keep the property and funds of the estate separate from his own funds. If he deposits funds of the estate in a bank in his own name, he thereby becomes liable for their loss, by failure of the bank,

even though the bank was in good credit at the time of the deposit and he had no funds of his own there, and the officers of the bank knew that they were trust funds.

But if the officer acts with reasonable prudence and deposits funds in the name of the estate, or in his official capacity, he will not be liable, if the bank of the deposit fails.

2. The officer should not use the funds of the estate in his own business or speculate with them on his own account. If he does so, it is a breach of his trust and he will be liable for the loss of the money, if the investment fails, and must account for all profits if it is successful. He will also be held liable for the highest rate of interest on the money, and the persons entitled may, at their option, take such rate of interest or the profits of the private undertaking.

3. As a rule, the representative should not invest, or permanently deposit, if he can use the funds of the estate in paying current expenses and demands, but when he can not do so, it is generally his duty, to invest the money in interest bearing securities and for a failure to do so within a reasonable time, he may be charged with interest.

4. In some states, the statutes specify the funds in which such investments may be made, but in the absence of a statute, the officer will be bound to exercise good faith and sound discretion. He may usually secure from the court an order as to the investment,

which, when followed, will protect him from personal liability.

5. The officer should use reasonable diligence and prudence to preserve and protect the property of the estate, and should care for the growing crops, live stock, and the like, and secure policies of insurance, and dispose of perishable property with reasonable diligence so as to prevent loss.

6. The representative is appointed to close up and not to continue the business of the deceased. He has, therefore, no general authority to continue the trade or business in which the deceased was engaged, and if he does so, will be liable for the losses incurred and must account for all the profits.

But a reasonable discretion will be allowed him in choosing the time, place and circumstances under which the business or trade shall be wound up, so as to enable him to dispose of it to advantage.

And the testator may, by his will, direct the continuance of his business by the executor for a limited time, and in such cases, the executor will incur no personal liability while acting within the authority so conferred upon him by the testator.

Where the business is continued at the request of those interested in the estate, they can not complain of the acts of the representative, nor insist that he be charged with losses.

7. The same general rule applies to the settlement of the interest of the deceased in a partnership. Un-

less otherwise specified in the articles, the death of one partner dissolves the partnership and the surviving partner takes the entire legal title to the assets, for the purpose of winding up the business as soon as practicable. When the partnership affairs are wound up the interests of the deceased partner are to be turned over to his representative. The representative has no right to continue the partnership business, unless such a power is conferred by the will or granted by the consent of the parties interested in the estate.

8. Undertakings by the deceased to perform purely personal services cannot be performed by the representative, but contracts of a general nature which are binding upon the deceased may be performed by the representative, if there is a reasonable prospect of profit, though at common law, the representative incurred the risk of being liable for the losses.

9. For any act of waste, mismanagement or breach of duty, by which the estate suffers loss, the representative becomes personally liable. Such losses or injuries to the estate by the representative are technically called "devastavit," that is, a waste committed by the representative.

10. The title to the personal property vests in the representative for the purpose of paying the debts and legacies charged upon the estate, and he may sell such property when necessary for that purpose. And unless restrained by the statutes, he may sell without the license of the court, subject only to his general obliga-

tion to act in good faith and with reasonable prudence.

The statutes in some states provide for the license, or order of sale, from the probate court. And in some of the states such license or order is indispensable. But they are usually held to be for the protection of the officer only, and he may sell without such license if he can realize a fair value, not less than the inventory value, though with such a license, a sale for less than the inventory value will protect the officer.

11. Unless provided otherwise by statute, the disposition of the property may be either at public or private sale, but the statutes providing for a license to sell usually require the court to fix the method, or provide only for a public sale.

So the authority of the officer to sell, may be conferred or enlarged by the will, and such sales authorized by the will usually require no license. The power to sell includes the power to sell and assign negotiable securities, also chattels real. And unless restrained by the statute the officer may pledge or mortgage the personal property to procure the necessary funds to manage the estate.

12. A third person buying of the officer is not bound to see that such officer properly applies or accounts for the proceeds derived from the sale; nor will such person's title be affected by the fraud of the officer, if he himself acts in good faith with reasonable prudence and parts with value. But if such third person col-

ludes with the officer, or has reason to believe that the officer is acting wrongfully, he cannot acquire a valid title. The officer has no right to give away the assets of the estate and the person receiving such a gift is bound to know this fact.

13. The officer as such has no power to bind the estate by contract, and his attempt at such a contract will bind himself only, or no one. The fact that he added the word "executor" or "administrator" to his written promise, or made the contract as such officer will not relieve him. He can only relieve himself from personal responsibility by limiting his promise to the assets of the estate.

A judgment or decree against him in his official capacity upon a demand created by him during the settlement of the estate binds him personally. But the estate alone is bound on a cause of action created by the deceased.

14. In the absence of a statute authorizing it, the officer has no power to sell or mortgage the real estate. But in nearly all of the states such a power is conferred by statute for the purpose of paying the debts, and often for the purpose of paying legacies.

These statutes provide that in case of a deficiency of personal property the court may authorize the sale or mortgage of so much of the real estate as may be necessary to provide for the deficiency. These statutes usually require, first, a petition showing the necessity; second, a special bond from the officer to cover the pro-

ceeds of the sale; third, a formal sale, usually a public one; fourth, the execution of a proper deed under the direction of the court, and fifth, a proper disposition of the money derived from such sale.

The jurisdiction to order the sale of real estate is purely statutory, and in order that valid title may pass it is essential that the court should have acquired jurisdiction and that all the requisites of the statute shall be substantially complied with. But there are many irregularities which will suffice to set aside such a sale if raised by appeal or a direct proceeding for that purpose, which will not suffice if the sale is attacked collaterally. The majority of the courts in this country hold that if the court had jurisdiction and notice was given to parties interested, the proceedings cannot be attacked collaterally for irregularities or for a failure to observe those requirements which were evidently not designed for the essential protection of the parties in interest.

In a few states where probate courts are held to be courts of inferior and limited jurisdiction, it is held that every fact prescribed by the statute to authorize the order of sale must affirmatively appear.

The period within which such order may be granted is usually fixed by statute; where no statute exists the application must be made within a reasonable time, and at all events before the statute of limitations has operated.

15. The officer will not be permitted directly or in-

directly to buy at his own sale, and if he does the sale may be set aside.

The rights of creditors take precedence over those of devisees or legatees, and therefore all of the real estate, whether devised or not, may be sold under these statutes to pay debts. But legacies have necessarily no priority over devises, and lands devised will not be sold to pay legacies, except where the devise is of the residue after the payment of debts and legacies, or where the land is charged with the payment of legacies.

Sec. 1044. CONCERNING THE LIABILITY OF THE OFFICER.—The liability of the officer, as such, may arise, (a) from the acts of the deceased, or (b) from his own acts.

(a) Extent of Liability for Acts of Deceased. To the extent of the assets the officer is liable for all the debts and contracts of the decedent upon which actions were or might have been brought in his life time, excepting only those contracts founded upon purely personal considerations.

1. The same rules govern the survival of actions against the representative, which govern the survival of actions in his favor. The liability of the officer extends only to the valid contracts and debts of the deceased, and the representative has no authority to make contracts for him or to ratify his invalid transactions.

2. Actions of tort against the deceased, like those

in his favor, die with him, at common law. But the same statutes which make them survive in his favor, usually make them survive against him.

3. Where two or more are jointly indebted and one dies, the action at common law is to be brought against the survivor or survivors only. If the action is on a joint obligation, and one of the plaintiffs dies, the action proceeds by the survivor only. But if the action is upon an obligation which was joint and several, the representative of the deceased party may be brought in.

4. The representative is bound upon those covenants of the deceased concerning real estate which were not personal to himself or terminated by his death. Thus, to the extent of the assets, the representative is bound by the covenants of the deceased in a lease or deed, and by his agreements to buy or sell land, and this whether the breach occurred before or after the death of decedent. But on covenants implied by law the representative is not bound unless the breach occurred during the life of the deceased.

(b) Officer's liability for his own acts. The officer is personally liable for those acts either of active wrong-doing or of negligence by which the estate suffers loss. He is usually held personally liable upon all causes of action which have arisen since the death of the deceased. When sued for causes of action arising in the life time of the deceased the action is against him in his official capacity. While upon causes of action arising since the death of deceased, he is sued as an

individual, except that upon contracts relating to the estate, he may be sued either as an individual or in his representative capacity, if the consideration or cause of the action arose in the life time of the deceased.

Sec. 1045. CONCERNING THE PAYMENT OF DEBTS AND LEGACIES.—It is the primary duty of the officer to pay out of the assets, the legal charges against the estate. Before the claims of the general creditors can be considered there are usually three classes of claims given precedence by statute, these are: 1. The allowance made for the support of the widow and minor children of the decedent. 2. Funeral expenses. 3. Expenses of administration.

It is the duty of the officer, if there are assets, to bury the deceased in a manner conforming to his estate, and the expenses incurred may be properly chargeable as an expense of administration. In some states such expenses are classed with the general debts, though often given precedence, and in such cases would yield priority to the other expenses of administration.

If the assets exceed the amount required for the payment of these classes of claims, then the general debts of the deceased are to be paid. As to these the statutes in the various states establish different orders of priority. Usually, the funeral expenses come first, and with them, frequently, the expenses of the last sickness; then debts due the government, as public rates and taxes; next judgments and debts due upon special-

ties, and in some states, the debts due to laborers and for rent, and finally the general debts of the deceased due to all other persons.*

In case of a deficiency of assets the officer will render himself personally liable by paying a debt of inferior rank without reserving enough to pay those of a superior rank. And in case of a deficiency of assets, all debts of the same rank share ratably, that is, they abate ratably.

Public notice is required to be given by the administrator or executor, that creditors may present their claims for allowance and payment, and the statutes prescribe a time within which claims must be presented or they will be disregarded.

In some of the states claims are to be presented to the representative, but in most of the states provision is made by statute for presentation to, and allowance by, some tribunal, appointed by the court, or else by the court itself. In most cases they are to be verified by the oath of the claimant or established by legal evidence.

As a statutory rule no action can be brought against the representative, or levy upon the assets made, during the time allowed by law for the payment of claims, upon any claim required to be presented for allowance. The rule requiring presentment does not usually apply to those unliquidated claims which can only be deter-

*Rev. Stat. of Ohio, Sec. 6090; McClellan v. Filson, 44 O. S. 184.

mined by an action at law. A judgment can be presented for allowance.

It is the duty of the representative to interpose all defenses which the deceased might have made in his life time as well as those arising since his death, and to take advantage of all set-offs and counter claims which are available. The officer will not be allowed to waive the benefit of the statute of limitations, or to ratify dealings which are invalid under the statute of frauds, or to waive the special statutes providing for presentation and allowance of claims within a specified time.

The statutes usually make provision for the allowance of contingent claims subject to the contingency, and for allowing claims not yet due. Either party grieved by the allowance or rejection of a claim, may appeal, either to a higher court, or in states where claims are not judicially passed upon, to the courts of law.

The claims having been finally passed upon, it is the duty of the representative to lay before the court a statement of the amount and nature of the claims and the character of the assets available for their payment. If necessary, application for licenses for leave to sell personal or real property are then made, and sales are had, and when the assets are finally in a distributable form, an order or decree is made, determining the order or priority of payment, the amount of the dividend, where all claims cannot be paid in full, and decreeing payment in the manner so determined. The payment

of the debts according to this decree may be enforced by action, and in many states by a statutory remedy against the representative and his sureties.

Before the representative can safely pay over legacies, whether general or specific, he must see that the debts are paid. If there are contingent claims outstanding, or if legacies are made payable before the time allowed for the presentation of claims has expired, the representative is entitled to indemnity from the legatees before paying them. Unless otherwise provided by statute, legacies are deemed payable within one year from testator's death. Though the right to the legacy is deemed to vest at the testator's death. The income and profits on specific legacies accruing since the death of the testator pass with the legacies, but interest on general legacies is not allowed until after they are payable.

Specific things bequeathed are to be identified and delivered to the legatee, and general legacies are to be paid in money. The legatee has no right to take possession of his legacy until the representative consents, although if he unreasonably withholds his consent it may be compelled in equity. Assent to a specific legacy vests the title in the legatee and is irrevocable. But if, after the delivery or payment of legacies, unexpected claims arise, equity will compel the legatees to refund.

Where a specific legacy is appropriated to the payment of debts or other legal charges against the estate,

the legatee, in case the general or residuary legacies are not sufficient, is entitled to contribution from the holders of other specific legacies. The order of contribution is as follows: 1. Personal property undisposed of. 2. General residuary legacies. 3. General legacies. 4. Specific legacies.

Where lands specifically devised are taken to pay debts, the devisee is entitled to indemnity from any other class of property which should have been first taken; if there be none such, then to contribution from other devisees whose gifts are equally liable to be called on for the payment of debts. The testator may, by his will, determine the order in which his property shall be applied to the payment of debts, as by charging them in whole or in part on the realty, or upon the personal property; and the same end many be accomplished by his directing that certain of his property shall be exonerated from the payment of debts, thus charging the debts on the other classes of property.

In appropriating the assets to the payment of debts the following order is, in general, to be observed:*

1. The general personal estate, unless expressly or impliedly exonerated.
2. Lands expressly devised to pay debts.
3. Estates which descend to the heir.
4. Real or personal estate devised or bequeathed, charged with debts.

*In Ohio after the personal property and undevised realty are disposed of, all devises and legacies must contribute pro rata to the payment of debts. Stat. of Ohio, Secs. 5972, 5973.

5. General pecuniary legacies pro rata.

6. Specific legacies and devises pro rata, whether in terms specific or residuary.

7. Real or personal property of the testator appointed by the testator under a general power.

Debts and legacies will be deemed charged upon the land not only when the will expressly so declares, but also where such an intention is fairly to be inferred from the language used. Where there is sufficient personal property to pay the debts and the land is taken, the heir or devisee may have reimbursement out of the personality. And where the debts are charged upon the land and the personal property is taken, the land will be compelled to reimburse the personal estate.

Where there are two claimants, one of whom has access to two funds while the other has but access to one of the funds, the assets will be marshalled so as to compel the first claimant to exhaust the separate fund first.

Sec. 1046. CO-EXECUTORS AND CO-ADMINISTRATORS.—The administration of the estate of a decedent may be entrusted to two or more administrators. In such a case the authority and interest of all is joint and entire, and they are looked upon in law as one person. Upon the death of one the entire authority vests in the survivor. Each is entitled to the possession of the assets, and the possession of one is the possession of all. As respects the personal estate one may do what all may do, and the act of one within

the scope of his authority is the act of all. The same good faith and prudence is required of each, which would be required if there was but one.

In general, each one is liable for his own defaults only, and for the assets so far as they come into his hands. But one will be liable for the acts and defaults of another where he gives a joint bond with him, or joins in the act, or reduces the assets to the sole possession of his associate, or is guilty of negligence in permitting the default of the other, or in any way directly contributes to the default.

Breaches of duty by one may be restrained in equity, at the suit of the other, or the guilty one may be removed by the probate court. All should join in bringing actions on behalf of the estate, and should ordinarily be sued together, though one may sue or be sued alone on contracts made by him on his own account, or for goods taken out of his possession. One joint administrator cannot sue the other, or the estate, on matters connected with their administration.

A person cannot be forced into a joint administration against his will, but an agreement between two such joint officers, that one alone shall manage the joint estate is void. A principal, and an ancillary administrator are not co-representatives within the meaning of these rules.

Sec. 1047. FOREIGN REPRESENTATIVES.—A personal representative appointed in one state has no legal authority in another state, and cannot there

sue or be sued in his official capacity. Statutes exist in many states by which a representative from another state may be reappointed if no local administration has been already granted. And in a few states the foreign representative is recognized without re-appointment.

Administration must therefore, usually, be taken out in each state in which there are assets, but after the satisfaction, in whole or pro rata, of the local creditors, the residue of the assets will usually be transmitted to the principal jurisdiction. The amount to be allowed to the local creditors is usually determined by the proportion which the assets in all jurisdictions, bear to the debts in all jurisdictions. Though in some states local creditors are required to be paid in full out of local assets.

Though the foreign representative cannot sue, it is held that his assignee may; and it is also held that the voluntary payment or delivery of assets to the foreign principal representative, before a local one is appointed, will protect the party so paying.

And upon obligations which may be enforced by or against the representative in his personal capacity, actions may be brought by or against him in a foreign state. The allowance of a claim in one jurisdiction is held not to be conclusive on assets in another, but such claim must be presented anew where the assets exist.

Sec. 1048. ADMINISTRATOR WITH THE WILL ANNEXED.—The powers and duties of an administrator with the will annexed is substantially

those of an executor, except that special commissions, trusts, or powers conferred by the will upon the original executor, and which imply a personal confidence in the executor named, will not pass to the administrator with the will annexed.

Sec. 1049. ADMINISTRATOR DE BONIS NON.—An administrator *"de bonis non,"* as the name implies, is appointed to complete the work of a former administrator. Such an officer whether appointed in a testate or intestate estate, has all the rights and powers and is subject to all the responsibilities of an original representative so far as the estate is left unadministered. He may recover all assets from his predecessor or third persons, and may bring all actions necessary for that purpose, and is not estopped by the illegal acts of his predecessor.

Whatever his predecessor rightfully did, is binding upon the administrator de bonis non, but wrongful or improper actions are not binding. The successor to an administrator is bound upon contracts of his predecessor, and may avail himself of those which are assets of the estate. He is not liable for the defaults of his predecessor, but is bound to exercise the same good faith, prudence and diligence which are required of any representative.

Sec. 1050. THE ACCOUNTING AND DISCHARGE OF THE ADMINISTRATOR.—The representative is bound to keep full and accurate accounts of his official transactions, and is usually required to

render an account to the probate court at stated intervals,—frequently at the close of each year.

Upon the expiration of his trust, either by full performance, or by resignation or removal, it is his duty to render a final account. Before the final account will be allowed, notice is required to be given to parties interested in the estate that they may appear and dispute its correctness if they desire. The officer is to charge himself with all assets which have come into his possession, whether inventoried or not, and with all income, increase and profit, arising spontaneously or as a result of his good management or effort. He is to be charged also with all assets or profits which have been lost by his misconduct or negligence.

He is to be credited with all his lawful distributions and payments; with the necessary expenses and disbursements for the estate, and his proper compensation.

At common law the officer was not entitled to compensation, but by statute in most of the states a rate of compensation is fixed, and the probate court has usually the power to, and will allow him extra compensation, for extra or unusual services.

Upon the final allowance of his accounts by the probate court the officer is entitled to be discharged from his trust and to have his bond cancelled. Appeals may be taken from orders allowing or disallowing his accounts, but unless thus appealed from, the decree allowing his final account and discharging the officer, is

to be regarded as conclusive, and generally cannot elsewhere be called in question.

With the final allowance of his accounts and the discharge of the officer, upon a full administration of the estate, the settlement of the estate is ended.

QUESTIONS FOR STUDENTS.

The questions are numbered to correspond with the sections in this book. The answers and references for further study may be obtained by referring to the corresponding sections.

CHAPTER I.

921. What can you say as to the meaning and scope of the subject of wills? What two systems for the disposition of property have come to prevail?

922. Explain the difference between a will and the law of descent and distribution. What general term is given to both subjects?

923. Name the appropriate divisions into which the law of wills is divided.

924. Define a will. What is meant by last will and testament? What is the person called who makes a will? What is meant by the words "testate" and "intestate?" What granting words are used in a will? What is the distinction between them when technically used? What is meant by the word devisee? Legatee?

925. What is meant by a written will? A holographic will? A nuncupative will?

926. Define a codicil.

927. How does a will differ from a gift? From a gift *causa mortis*? When is such a gift valid?

928. Name some of the leading authorities on the law of wills.

CHAPTER II.

929. What can you say of the history and origin of wills? In primitive nations what right had the individual in land?

930. What was the status of the will in England prior to 1066?

931. What effect did the Norman Conquest have upon the will in England? Why? What was the nature of the statute *de donis*? Did it affect wills?

932. Describe the attempt of the courts of equity to revive

the right to will lands. What is meant by the Statute of Uses? What was the effect of this statute? How was its effect avoided?

933. When was the Statute of Wills passed, and what was its purpose and effect? Who might make wills thereafter? What has become of the feudal system? What can you say as to the "Doctrine of Reasonable Parts?"

934. What can you say as to the history of wills and testaments in the United States?

CHAPTER III.

935. What is the general rule as to the extent of testamentary power in the United States? What property may be disposed of?

936. Mention and discuss the eleven exceptions that may be noted to the general rule that impose restraints upon the free disposition of his property by the testator. What can you say as to the disposing of after-acquired property by will?

937. What is the nature of the testator's right to make a will? Is it protected by constitutional provisions?

938. When do the rights of devisees and legatees become vested property rights? After the death of the testator, may the legislature change the law validating or invalidating the testator's will? Give the reason in full for your answer.

CHAPTER IV.

939. Give the present general rule as to who may make a will. What must they do? Did the rules regarding capacity to make a will at common law differ as regards realty and personalty? If so, why? What distinction, if any, is made at present? What four classes of disabilities affect the rights of persons to make wills?

940. What can you say as to wills made by (a) criminals; (b) aliens; (c) married women, both at common law and under modern law? Under what circumstances could a married woman make a will of personal property at common law? Do these disabilities still continue?

941. What is the rule prevailing in your own State as regards the right of a married woman to dispose of property by will? What is the rule generally as to her rights?

942. What is meant by nonage? May an infant make a will? What was the rule at common law as to the age of ca-

pacity? What is the general age fixed by statute in the United States? What is the age of capacity in your State?

943. What is the effect of a will made by a person under the age of capacity as fixed by the statute? When is an infant deemed to become of age?

944. What can you say as to the mental capacity required in order to make a valid will? What is meant by "sound mind?" Is mental capacity synonymous with criminal responsibility? With capacity to contract?

945. Give the general rule by which the testamentary capacity of testator is governed. What is meant by this rule?

946. Mention and describe some forms of physical and mental disorders which do not incapacitate the testator. How does old age, nearness to death, failure of memory, eccentricities, and the like, affect the question of capacity? What degree of mental competency is required to make a will?

947. What is meant by an idiot? By an imbecile? What testamentary capacity do they have?

948. What is meant by lunacy or a lunatic? Define insanity. What is meant by a "lucid interval?" When may a lunatic make a valid will? What is the test of lunacy? Define an insane delusion, giving the characteristic elements. When, if at all, will a person be presumed insane and incapacitated to make a valid will? Upon whom is the burden of proof to prove a lucid interval? What standard of capacity is required during a lucid interval.

949. What is meant by (a) delirium; (b) drunkenness; (c) dementia, and how are they to be distinguished from lunacy? How far do these ailments incapacitate? Upon whom rests the burden of proving incapacity from them? State the case of Pierce v. Pierce, 38 Mich. 412. What is meant by "*senile dementia?*" How is dementia distinguished from mania? and delrium? What mental condition must exist to constitute *dementia?*

950. What is meant by *momania?* Give the test of the existence of *momania.* What is not enough to constitute an insane delusion? Give examples.

951. What effect will fraud practiced upon the testator have on the validity of a will? Distinguish between fraud that does vitiate a will and fraud that does not vitiate a will, and give the technical name of each. What can you say as to mistake or error on the part of the testator invalidating the will? What two kinds of mistake? Explain each and give exam-

ples. When will courts of equity correct mistakes in wills?

952. Define "undue influence." How may it be exercised? Explain why a will is invalidated for undue influence. State the case of Rollwagen v. Rollwagen, 63 N. Y. 504. Give examples of influence or appeals that do not constitute undue influence.

953. Can the amount of influence required to constitute undue influence be stated definitely in all cases? Give reasons for your answer. Mention the fiduciary relations which may raise presumptions of undue influence. What relations do not raise presumptions of undue influence? Why?

954. Upon whom rests the burden of proving undue influence? When may this rule change?

955. What can you say as to the divisions of undue influence and the class of evidence usually relied upon to prove it? When are the declarations of the testator allowed, when the issue is undue influence? When will the admissions of the legatee be admissible against him? When not?

956. What is the effect of undue influence when found to exist? Will any part of the will affected by undue influence stand?

CHAPTER V.

957. Who may take by will?

958. What exceptions can you mention to the rule as to who may take by will? Discuss the right of aliens to take property by will, both at common law and under modern statutes.

959. Discuss the right of corporations to take property by will under the common law and under modern statutes. Also unincorporated companies and public corporations.

960. May subscribing witnesses take under the will which they attest? Can a person who murders the testator take by his will?

961. What was the rule at common law governing gifts to illegitimate children? What is the modern rule? How would you describe an unborn illegitimate child?

CHAPTER VI.

962. What governs formalities required in the execution of a will? What formalities are uniformly required?

963. What wills must be in writing? What was the rule under the early English law?

964. Define a nuncupative will? What class of property can be disposed of by it? What persons may make nuncupative wills? Dictate the form of a nuncupative will. How many witnesses are required to such a will in England—in the United States? Can a nuncupative will be partly in writing? Can a written will be revoked by a nuncupative will? If the testator recovers, what is the effect of a nuncupative will? State fully the statutory provisions of your state in regard to nuncupative wills?

964. What satisfies a requirement of writing? Is a will valid if written or signed in pencil? Upon what may it be written—in what language? If different sheets are found attached together what is the presumption? If written on several sheets, how should they be connected?

965. What can you say as to the form required to constitute a writing a will? Is it necessary to use the words "will" or "testament?" What is the test which decides whether an instrument is a will or not? Mention some other instruments which a will may assume the form of? Give the rule as stated by Professor Page as to what makes an instrument a will. Give examples of instruments in other forms that were held to be wills. What is included in the subject matter of testamentary disposition?

966. When is a will said to be contingent? What is the most common form of contingent wills? Distinguish the difference between contingencies which are held to be conditions and those which are held to be the occasion or inducement for making the will. What is the effect in each case? Which construction do the courts prefer to put upon contingent wills? Give examples of wills held contingent. If the contingency effects only a part of the will, what is the result?

967. How may a paper be made part of a will by a reference? What is this called? State what is necessary that a paper may be incorporated by reference. What is the effect of such an incorporation?

968. Give examples of what constitute a sufficient reference to a paper to incorporate it as part of a will. May verbal instructions be incorporated by reference? May extrinsic evidence be used to identify the document referred to?

969. Do the statutes require signing by the testator? How may the testator sign his will? May he authorize some one else to sign his name for him? If so, how may this be done? What are the usual provisions of the statute governing the

signing by another? What is meant by the "presence of the testator"—by "express direction of the testator?"

970. What is the rule as to who may sign the name of the testator, and how should it be done?

971-972. Discuss the statutory provisions governing the place of the testator's signature, and give the provisions of the statute in your State. May the signature be on a separate paper? Does your statute require that the will be signed at the "end thereof?"

973. Discuss fully what is meant by the provision that a will shall be signed at the "end thereof." What is the effect of adding a dispositive clause after the signature of the testator in such cases? Explain what is meant by a "dispositive clause." Give holdings under this statute.

974. What can you say as to the necessity of sealing a will?

975. What requirement is usually made in regard to attestation and subscription by witnesses? What distinction is made between attestation and subscription?

976. For what purposes are the witnesses required to sign? When is the testator required to sign the will in the presence of the witnesses? When not? If the testator neither signs nor acknowledges his signature in the presence of the witnesses, what is the effect?

977. What form of acknowledgment must the testator make? Is it necessary that the signature of testator be visible to the witnesses when acknowledged? Explain fully. What is the rule in New York? What is the rule in your State? What is a sufficient declaration by the testator that it is his will? Is it necessary that the witnesses should know the contents of the instrument or that it is a will?

978. Must the witnesses sign in the presence of each other? In the presence of the testator? Is it essential that the testator should request the witnesses to sign? What is required in your State? How may the witness sign and where? What intention must the witness have in signing the will? May a witness authorize some one else to write his name in your State?

979. What is meant by "in the presence of testator?" In what other cases is this expression used with the same meaning? When will a witness be deemed to have signed in the presence of the testator? Give examples. What presumptions arise when the signing is done in the same room with

testator? In another room? What is the rule when the testator is blind or physically weak and unable to see? State the holding and facts in the case of Cook v. Winchester, 81 Mich. 581. What must the testator see in connection with the signing? May the witnesses acknowledge their signatures to the testator in case they have not signed in his presence? Retrace their names with a dry pen? In what order must the testator and witnesses sign?

980. What is meant by an attestation clause? Is it necessary to the validity of the will? How far is it conclusive of what occurred? Write out the common form of such a clause. Is it necessary to affix the place of residence of the testator?

981. In general, who are competent witnesses? What distinction is made between "competent" and "credible" witnesses? At what time must the competency exist?

982. What is the nature of the interest which disqualifies a witness? What does not disqualify? Give examples. When the witness is disqualified by reason of interest, what is the effect of his releasing his interest under the will? What provisions in this respect are made by statute? May the wife of the testator or of the legatee sign as witness at common law? Under modern statutes?

983. How many witnesses are required to a will? In your State?

984. What is meant by publication of a will? When is this required? What is the form used? What is the order in which it should be done? Will acknowledgment of signature constitute a publication where statutes require publication?

985. What is meant by holographic wills? What peculiarities attach to them in some States? In your State? Must the whole will be in the handwriting of the testator? What are the usual statutory provisions concerning such wills?

986. Define a codicil. Are the requirements for its execution similar to that of a will? What purpose may it effect? May there be more than one codicil to a will? How is a will with codicils construed? What effect will a valid codicil have upon an invalid will to which it refers? What is the date of a will republished by a codicil? In what respect does a codicil in its effect differ from a new will?

CHAPTER VII.

987. What is meant by revocation? What is the effect?

988. What is the character of a will in the life time of the

testator? State the capacity required to revoke a will. Under what circumstances will a revocation fail?

989. In what ways may a revocation be effected?

990. How is the subject of revocation by the act of testator controlled? Give the substance of the State statutes in this regard. Are the mere wishes or declarations of the testator sufficient to effect a revocation? Give reason for answer. State the holding in Kent v. Mahaffey, 10 O. S. 204.

991. What is necessary to constitute revocation by burning, tearing and the like? What intent on the part of testator must exist? What is the effect of destroying the will under a misapprehension as to its validity? Explain the holdings in regard to a will fraudulently preserved when the testator directed its destruction with the intention of revoking. If a will partly destroyed is preserved with the consent of testator is revocation prevented? If without his consent it is preserved, what is the effect? What governs the extent of destruction necessary to revoke? When are witnesses necessary to the act of revocation? May a part of a will be revoked leaving the rest valid? State case of Eschbach v. Collins, 61 Md. 478. May the revocation of a will be made conditioned upon the execution of another will in its place? What evidence as to testator's intention must be shown in this case? When does the revocation of a will revoke a codicil? when not? What may be shown in regard to a will found mutilated, torn and the like? What presumptions prevail in the absence of proof to the contrary? Where a will has existed and cannot be found, what presumptions arise? What is the nature of these presumptions?

992. What is the rule as to which of two wills control? If one does not expressly revoke the other what is the result? What form may the revoking instrument assume? May a revoking clause prevail though the rest of the instrument fail? If two inconsistent wills of same date be found what is result? May a revoking will or codicil which has been lost be given effect? What must be proven first? When does the revocation of a revoking will revive the former instrument? What is the statute of your state in this regard? What distinction is drawn from the nature of the revoking will in this regard?

993. At the common law what effect had a change in testator's property on his will? On his testament? Does this rule prevail now? At common law what effect had the mar-

riage of a woman on her will? To what extent does this rule still prevail? By what is it modified? At common law what effect had marriage and the birth of issue upon a man's will? Does this rule prevail in the United States? On what reasoning was it based at common law? At present? Did marriage alone revoke a man's will at common law? Does it now? What changes at common law in the circumstances of the testator were held to revoke his will? What changes are now held to do so? What changes will not revoke his will? What theory supported the doctrine of revocation by change of circumstances? Does a will impliedly revoked, as by marriage and birth of issue, revive on the dissolution of the marriage or death of the issue?

994. What three things do the state statutes usually provide in regard to the effect of the birth of children upon the previous will of the testator? Give the provisions of the statute in your state.

995. How may the testator disinherit a child? Is formal language necessary? Is the mere disposition of his property to others sufficient?

996. What is sufficient provision for a child to satisfy the statutes? Give examples. Is a child in being, but unborn, protected by the statutes? When will the birth of an illegitimate child revoke a previous will? Will the adoption of a child revoke testator's previous will?

CHAPTER VIII.

997. What is meant by re-publication of wills, and how may it be effected? At common law, prior to the Statute of Frauds, how might a will be republished? How has this rule been abrogated? What is the effect of republication?

998. What is meant by a joint will? May two persons make a mutual will? What is the effect of a mutual will? State the case of The Estate of Mary Cawley, 136 Pa. St. 628. Why may not the death of the survivor be made the time of taking effect of a mutual will? When may it operate as the will of both? What is the effect of two persons signing a will as to property of one? Must a will operate as to all of testator's property? May a will be executed in duplicate? In the alternative?

999. May a contract be made governing the disposition of property by will? When must such contract be in writing to be valid? When not? Must there be a consideration for

the promise? What must the party claiming under the contract show? What remedy has the claimant for the breach of an agreement to leave property by will? Is a contract between the heir at law and testator as to the property of testator valid? If the amount of the legacy is not specified, what will be sufficient to satisfy the claimant under a contract?

1000. By what law are questions of capacity and the formalities of execution and the like governed? What is the effect of a will not in conformity with the law of the place where the real estate lies? What is the rule as to personal property? What statutory changes in these rules? In your state?

CHAPTER IX.

1001. What is meant by probate? Under modern law when does the will take effect? At common law?

1002. What were the methods of proving testaments at common law? Explain each. In the United States what is the mode of proving a will?

1003. In what courts are wills to be probated? How are they determined? By what name are they known in your state? What are the powers and limits of their jurisdiction? How are their judgments and decrees reviewed? What jurisdiction have the equity courts to decree the probate of wills?

1004. What may be said as to the nature of probate proceedings? And what effect has this on notice and collateral attacks? Upon whom is the judgment or decree of the probate court binding? Explain fully.

1005. What should be probated? When? What is the result of a failure to probate?

1006. Who may probate the will?

1007. What is the usual procedure in probating a will? When will the will be admitted to probate on the testimony of one witness? How is the testimony taken? When may other witnesses than the subscribing witnesses be used? What is admissible in such cases? May the will be established against the testimony of the subscribing witnesses?

1008. State what formalities as regards pleading are necessary in the contest of a will. Who may contest? Does the right to contest survive? How may a party estop himself from the right to contest? Who may defend in a contest? Within what time must the action be brought? What exceptions? What notice should be given?

1009. State the mode of procedure at the trial of a con-

tested will. May a jury trial be demanded? How is the capacity of the testator proven when attacked? What witnesses may give their opinion as to testator's sanity or insanity? What form of question may be asked? What is the form of the verdict? How far conclusive is the verdict? May a valid agreement not to contest be made?

1010. May a lost or spoliated will be admitted to probate? What is the kind and extent of evidence necessary? What difference as regards the rule of proof in the various states? How is the suit commenced? What may be considered on contest?

1011. What can you say as to the probate of foreign wills? What is the effect of such probate? What difference in the state statutes?

1012. What must be shown to probate a contingent or conditional will?

1013. Who takes charge of the will after probate?

CHAPTER X.

1014. Explain fully what is meant by the construction and effect of wills. What is meant by rules of construction? Presumptions? Rules of law?

1015. To what formula may a rule of construction be reduced? How is it applied? What does the court seek to discover in the will? Into what classes are rules of construction divided?

1016. Discuss the various general principles of construction.

1017. Explain and discuss the principles of construction applicable to real estate.

1018. Discuss and explain the various special rules of construction applicable to personal property.

1019. What are the rules of construction as respects the description of beneficiaries? Explain the meaning of "children," "descendants," "relatives," "family," "heir," and the like.

1020. What is meant by a gift to a class? What are the special rules applicable to such gifts? Write a clause in which a gift is made to a class. What is meant by *per capita* and *per stirpes*? How is it determined by which method the legatees shall take?

1021. What is meant by a residuary clause. What classes of them? Mention and discuss the rules of construction in

relation to them. When will a legacy pass to the heirs instead of under the residuary clause?

1022. What estates may be given by will? What is a fee-simple estate and how may it be created by will? A fee-tail? A life estate? A remainder? Estates upon condition? Mention some valid conditions upon which an estate may be limited? Some invalid conditions? May a life estate in personalty be created by will? If so, how?

1023. What is meant by a vested interest under a will? a contingent interest? What difference in them as to the legacy passing to the heir of the beneficiary? Mention and discuss the rules of construction applicable to the vesting of devises and legacies.

1024. Into what classes are legacies and devises divided? Define each and give an illustration of same. What is the order of their priority? What is meant by an abatement, and when is it necesessary? Which class of property is first liable for payment of legacies? What is meant by ademption? When does it occur? What is meant by satisfaction? What is necessary to constitute a satisfaction by will? What is meant by a cumulative legacy? A substitutional legacy? What rules govern each? When does a legacy lapse? What is meant by lapse? By void legacies? How are legacies charged upon a particular class of property?

1025. What are the general requisites to a valid bequest or devise? What is meant by the doctrine of *cy pres*? When are gifts void as violating the rule against perpetuities? When a condition is attached to an absolute gift what is the result?

1026. How does the court get jurisdiction to construe a will? What courts have jurisdiction to construe? Who should bring the action? Who are bound by the decree?

1027. Explain fully when parol evidence is admissible to aid in the construction of a will. When not admissible?

PART II.

CHAPTER I.

1028-1029. When the owner of property has made no will, how is his property disposed of? What are the statutes called by which the disposition is made? What distinction between the statutes or substantive law, and the law of administration?

1030. Explain fully the nature of the right to take property by descent. May the statutes governing the right be changed? When?

1031. What law governs descent and distribution? Any difference between realty and personalty made by the statutes? Explain what is meant by a person's domicile.

1032. Are the rules of descent still the same as they were at common law? What governs? Give the statute of descent as it exists in your state. As they exist generally. What is meant by "next of kin?" When do they inherit? What is meant by "consanguinity?" What two kinds? Define each. How are the degrees of consanguinity computed? Explain the different methods. Which rule prevails in your state? When does the title to the real property vest in the heir?

1033. What becomes of the title to personalty on the death of the owner? When does it vest in the personal representative? What is the general order of its distribution? What are the provisions of the statute in your state? Are the persons entitled to take the same as under the statute of descent? What share does the husband or wife take? When and how is the distribution of the personalty made? What may the person entitled do to get his share from the representative?

CHAPTER II.

1034. How is the will of the law to be carried into effect? What is the machinery called? What court has jurisdiction? If decedent died abroad what court has jurisdiction? If a non-resident? What proof is necessary to give the court jurisdiction? What presumptions prevail in this regard? If a party is not in fact dead what effect has the probate? How far will the settlement of the estate be sustained? How is the court set in motion? What should a petition contain? Give the

succeeding steps after the filing of the petition. What is the time within which the administration must be granted?

1035. Who is entitled to be appointed as administrator? What is the statute in your state? How may the right be forfeited? May a person renounce the administratorship? May he contract to do so?

1036. What is necessary to qualify for the office of administrator or executor? When may additional sureties be demanded?

1037. What is meant by letters of administration? How far conclusive are they? When may the court remove the officer? May he resign?

1038. What may the executor or administrator do in regard to the property before his appointment as such? What is meant by an executor *de son tort*? What are his rights and liabilities? How far do these rules still prevail?

1039. What is meant by the assets of the estate? What right has the officer over the real estate? Should he take possession of it? When is the real estate assets? May powers be conferred on the officer by the will of the owner? What rules are applicable to such powers? Do these powers follow the office to a successor? Why? What is meant by the doctrine of conversion in the law of wills? What are chattels real, and to whom do they go? Is the interest of the mortgage personalty? To whom does the interest of the mortgagor go?

1040. Into what general classes are the personal assets divided? What classes of personal property in possession? Define each class, and give examples. To whom does each class go on the death of the owner. What is included in choses, or rights in action? To whom do they go? What contracts of the deceased do not survive his death? What torts, or actions, for the recovery of damage do not survive? Does an action survive for wrongfully causing the death of a person? At common law? What other changes have been made in the common law rules as regards the assets of the estate?

1041. What can you say in regard to the inventory of the assets by the appraisers? How far conclusive is the inventory?

1042. What are the rights and duties of the officer as regards the collection and possession of the assets of the estate? State fully all the rules applicable.

1043. What are the officer's rights and duties as regards the management of the estate? How should he keep the es-

tate's funds? What is his right as to investing the funds? How may he invest them? In your state how? May he continue the business? How is the property sold my the officer? When may the officer bind the estate? When may he sell land? How is this done? Explain fully. May the officer buy the property? Why?

1044. From what may the liability of the officer arise? Explain the extent of his liability for acts of the deceased? Which of such actions survive the deceased? For what covenants of the deceased will the officer be bound? What is the extent of the officer's liability for his own acts? How should he be sued upon such actions?

1045. What is the officer's duty in regard to the payment of the debts and charges against the estate? What classes of claims are given precedence? What is the statute in this regard in your state? What is the effect of the failure of the officer to follow the rule as to the priority of the claims? How are creditors notified to present their claims? How and when must they do so? Describe fully. What is your state statute in this regard? When may an action be brought against the officer for a claim against the estate? What is the officer's duty when sued? How are contingent claims allowed? When all the claims are in what is done? When a final decree is made how is it enforced? When legacies are paid before other claims may the officer demand indemnity? Why? What is the order of contribution from the legatees? What indemnity may the devisee of land have from other property which should have been taken first to pay debts? What is the general and usual order of appropriating the property to the payment of debts?

1046. What is meant by co-administrator or co-executors? What are the rules applicable to them, as regards their rights, liabilities and method of handling the estate?

1047. Has a representative power in a state other than that in which he was appointed? What is the statute in this regard in your state? Must every claim be presented where the assets exist?

1048. What is meant by an administrator with the will annexed? What are his powers and duties?

1049. What accounts is the administrator required to keep. By whom are they audited? How often? When is the final account to be filed? What should the officer charge himself

with? What credit himself with? What compensation does the administrator get?

1049. What is meant by an administrator *de bonis non*? What property may he recover from his predecessor or others? What acts of his predecessor bind him? What do not? What are his liabilities and duties?

1050. What accounts is the administrator required to keep? To whom are these accounts rendered? How often? When is the final account to be filed? What is the officer to charge himself with. What credit himself with? What compensation does he receive in your state? When is he entitled to his discharge?

OHIO BAR EXAMINATION QUESTIONS, DECEMBER, 1902.

WILLS.

What is a will?

What distinction, if any, is there between a will and a testament?

What is a spoliated will?

What is a nuncupative will, and what are the requisites for a valid execution and probate of the same? And what is the force and effect of a duly executed nuncupative will in Ohio?

How may a will be revoked in Ohio?

In Ohio, during the time that a husband was entitled to an estate by the courtesy in the lands of his deceased wife, the wife of A died testate, being the owner of a farm on which she and her husband resided. By her will she gave to A certain notes which she held against him, and to her daughter her farm, appointing a trustee to collect the rents of the farm and pay the same over to her daughter during her life. A received from her executor the cancelled notes, accepted the same, and destroyed them, and refused to leave the farm or pay rent therefor. What are the rights of the husband, the trustee and the daughter in this farm, and why?

In Ohio, real estate is given by will to A, wife of B, for life, and after her death to her surviving children, for life, and then to B, and his heirs. What estate or estates did the children of A take on the probating of said will, and what estate, if any, did B take at that time? Give reasons.

FORMS.

FORMAL COMMENCEMENT AND END OF WILL.

In the Name of the Beloved Father of All: Amen.

I, John Doe, of the City of Conneaut, County of Ashtabula and State of Ohio, being about fifty-five years of age, and being of sound and disposing mind and memory, do make, publish and declare this my last Will and Testament, hereby revoking and making null and void all other last Wills and Testaments by me made heretofore:—

First:—My Will is, that all my just debts and funeral expenses shall be paid out of my estate, as soon after my decease as shall be found convenient.

Second:—I give, devise and bequeath to (*fill in devises and bequests*).

In Testimony Whereof, I have set my hand to this my Last Will and Testament, at Conneaut, Ohio, this 10th day of October, in the year of our Lord One Thousand Nine Hundred and Three.

(Signed.) JOHN DOE.

The foregoing Instrument was signed by the said John Doe, in our presence, and by him published and declared as and for his Last Will and Testament, and at his request, and in his presence, and in the presence of each other, we hereunto subscribe our Names as Attesting Witnesses, at Conneaut, Ohio, this tenth day of October, A. D. 1903.

(Signatures.)

John Smith, resides at Conneaut, Ohio.

William Stover, resides at Kingsville, Ohio.

SHORT FORM OF WILL.

(Containing bequests, devises, residuary clause, and clause appointing an executor.)

I, John Smitn, of Conneaut, Ashtabula County, Ohio, do herely make and publish my last will and testament.

I give and bequeath to Florence Smith, and James Thompson the sum of five hundred dollars each. To my servant John Henry I devise and bequeath the sum of one hundred dollars.

I give, devise and bequeath to my wife, Susannah Smith, my farm situated on the Ridge Road at Amboy, Ohio, and known as the "Smith Homestead."

I give, devise and bequeath to my children, Charles Smith, Floyd Smith and Mrs. Hannah Thompson, all the rest and residue of my estate, real and personal, to be divided among them in equal portions.

I hereby appoint my son, Charles Smith, sole executor of this will, and direct that he shall not be required to give bond in qualifying as my executor.

In testimony whereof, I have hereunto set my hand this first day of January, in the year one thousand, nine hundred.

JOHN SMITH.

Signed, published and declared by the above named John Smith, as and for his last will and testament in presence of us, who in his presence and in the presence of each other and at his request have hereunto subscribed our names as witnesses.

JOHN DOE,
SAMUEL JOHNSON.

CODICIL TO THE PRECEDING WILL.*

John Smith, make this Codicil to my last will and testament, which was dated first day of January, 1900. I cancel and revoke the legacy of five hundred dollars given to James Thompson.

I give to my wife, Susannah Smith, in addition to the portion given under my will five hundred dollars.

In all other respects I hereby confirm my will.

Witness my hand this first day of July, in the year one thousand, nine hundred and two. JOHN SMITH.

Signed, published and declared by the above named John Smith as and for a codicil to his last will and testament in presence of us who, in his presence and in the presence of

*This codicil may be attached to the will, or may be a separate instrument, but it must be executed with the same formalities as the original will.

each other, and at his request, have hereunto subscribed our names as attesting witnesses.

JOHN DOE,
SAMUEL JOHNSON,

APPLICATION FOR PROBATE OF WILL.

Probate Court,
———— County, Ohio. Application to admit to Probate.
In the matter of the last will and testament of ————, deceased.

To the Probate Court of said County:—

Your petitioner respectfully represents that ....., late a resident of ....., in said county, died on or about the ..... day of ....., A. D. 190.., leaving an instrument in writing, herewith produced, purporting to be his last will and testament.

That the said ....., died leaving ....., his widow, who resides at ....., and the following named persons, his only next of kin, to wit:

Names.	Degree of Kinship.*	P. O. Address.

Your petitioner offers said will for probate and prays that a time may be fixed for the proving of the same, and that said above named persons resident in this state may be notified according to law of the pendency of said proceedings,

....., Petitioner.

The State of Ohio,
———— County, ss.

The above named ....., being first duly sworn, says that the facts stated and allegations in the foregoing application contained, are true as he verily believes.

.....

Sworn to before me and signed in my presence this..... day of ....., 190..

....., Probate Judge.

*If any of the next of kin are minors give their ages.

WAIVER OF NOTICE ON APPLICATION FOR PROBATE.**

We, the undersigned, widow, and next of kin of the within named testator, resident in the State of Ohio, hereby waive further notice, and consent to the probate of said will.

Dated this ..... day of ....., 190...

.....

.....

.....

APPLICATION FOR LETTERS OF ADMINISTRATION.

The State of Ohio,
———— County, ss.

In Probate Court.

....., being duly sworn according to law, says that ....., a late resident of the township of ....., in said county, died on or about the ..... day of ....., A. D. 190.., leaving ...., his widow, whose post office address is ...., and the following persons his only heirs at law:

Names.	Degree of Kinship.	P. O. Address.

That ....., and ....., above named are children of said decedent under 15 years of age at the time of his decease. The undersigned asks to be appointed administrator of the estate of the said decedent, and on his oath says

The amount of personal property will be about $.....
And of real estate about ..... $.....

Total .... $.....

Sworn to before me, and signed in my presence, this ..... day of ....., 1906.

....., Probate Judge.

The State of Ohio,
———— County, ss.

In Probate Court.

The undersigned being sworn, says that there is not to his

**Unless notice is waived it must be given.

knowledge any last will and testament of the alleged intestate ....., deceased, and offers a bond as administrator of the estate of said decedent in the sum of $....., with ..... and ..... as sureties thereon.

.....

Sworn to before me, and signed in my presence, this ..... day of ....., 1906.

....., Probate Judge.*

APPLICATION FOR APPOINTMENT OF APPRAISERS.**

To the Probate Court of ..... County, Ohio:

The undersigned makes application for the appointment of appraisers of the estate and effects of ....., deceased, and suggests the names of ..... and ...., as suitable disinterested persons to act as such appraisers.

.....

PETITION TO CONTEST VALIDITY OF WILL.

The State of Ohio,

———— County, ss.

In the Court of Common Pleas.

A. B. and C. D., Plaintiffs,

vs.

E. F., as executor of the last will and testament of M. N. and G. H., Defendants.

PETITION.

M. N. died on the ..... day of ....., A. D. 190.. Plaintiffs are his children and his sole heirs at law.

On the ..... day of ....., A. D. 1906, a certain paper writing, purporting to be the last will and testament of the said M. N., deceased, which said writing was dated the ..... day of ....., 190.., was presented to the Probate Court of said county, and was admitted to probate by the said court of said County on the ..... day of .....

*This may be followed by a declination of those entitled to act as administrator and their recommendation of the party applying for the letters.

**The probate court usually furnishes administrators and executors with printed instructions containing such forms as it may be necessary for them to use in their official capacity.

....., A. D. 190.., and is recorded in Volume ....., at page ....., of the Record of Wills in said court.

Letters testamentary thereon were thereupon issued by said court to the defendant, E. F., as sole executor, who thereupon gave bond and qualified.

By the terms of the said paper writing all the defendants herein are named as the several legatees of and devisees of said M. N., deceased.

Said paper writing is not the last will and testament of said M. N., deceased.

Wherefore plaintiffs pray that an issue may be made up whether said paper writing is the last will and testament of said M. N., deceased, or not; that upon the trial of said issue, said paper writing may be declared not to be the last will and testament of said M. N., deceased, and for such other and further relief as plaintiffs may be entitled to in law or equity by reason of the premises.

.....
Attorneys for Plaintiffs.

State of ————,
County of ————, ss.

A. B., being first sworn, says that he is one of the plaintiffs herein, and that the allegations of the foregoing petition are true, as he verily believes. A. B.

Sworn to and subscribed before me this ..... day of ....., 190..

.....
Notary Public.

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 718 220 7